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Blood and Altruism *Joel Schwartz*

The Costly Compassion of the ADA *Roger Clegg*

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Boys will be boys

GWEN J. BROUDE

ARE boys in trouble today? Their situation is desperate, according to a coalition of clinical and academic psychologists. The alarming news has been trumpeted in scholarly journals as well as in several best-selling books, most notably William Pollack's *Real Boys* and Michael Gurian's *The Wonder of Boys* and *A Fine Young Man*. Both Pollack, codirector of the Center for Men at McClean Hospital of Harvard Medical School, and Gurian, a Washington-based family therapist, want to persuade us that we are in the midst of a boy crisis of epidemic proportion.

According to Pollack and Gurian, boys today are plagued by depression, isolation, despair, and fragile self-esteem. Boys are performing poorly in school compared with their sisters, who are now thriving. Diagnoses of attention-deficit disorder in male children are escalating, as are disciplinary problems, school drop-out rates, psychiatric disorders, and suicide. In the words of Pollack, "Many feel a sadness and disconnection they cannot even name." "Millions of our adolescent boys have

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experienced a trauma of some kind," asserts Gurian, and they haven't got the emotional resources, or support from others, to cope with the pain. Our boys are "like soldiers traumatized in wartime," and they are showing symptoms of "posttraumatic stress." Boys have also become dangerously aggressive, committing more and more crimes. The number of violent criminals among our adolescent boys is "incredible." And these males, in turn, pose a danger to the rest of us. Warns Gurian: "Trauma-causing adolescent males are everywhere."

Pollack, Gurian, and other psychologists raising the "boy problem" are not concerned about a small group of disadvantaged youngsters who might truly be in danger. They are talking about all boys, even those who seem to be "normal." We should not be fooled, says Gurian, by the "I'm fine" mask. When a boy says, "I'm fine," he actually means "things are not really fine." Boys who seem to have high self-esteem are, in fact, hiding a deep-seated lack of confidence. Many boys who *seem* to be doing well are actually living lives of quiet desperation. You or I may unwittingly be the parents of just such a boy.

Girls aren't O.K., boys aren't O.K.

What do alarmist psychologists blame for boys' traumas and disorders? In the 1960s, everyone worried about the condition of girls. Back then, feminists argued that girls and women were victimized by the traditional sex roles depicted in "Father Knows Best" and many children's books. Sex-role stereotypes were thought to encourage independence, assertiveness, and ambition in men while mandating dependence and docility in women. Moreover, society supposedly preferred male traits to female ones, viewing the latter as unhealthy. Feminists complained that these stereotypes were not only confining but also degrading to girls. Carol Gilligan saw sex-role stereotypes as most damaging in adolescence, when girls first came to understand that their "different voice," which emphasized interconnection and harmony instead of individuality and competition, was not appreciated by a male-dominated world.

Feminists had a solution to this "girl problem": Raise both little girls and boys to be androgynous. Androgyny, a grab bag of masculine and feminine traits, would liberate not only females but also males from the tyranny of sex roles. The an-

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drogynous person would exhibit a blend of desirable male and female characteristics—for instance, assertiveness and nurturing. In an androgynous world, females would be assertive and males sensitive, and everyone would be better off, for equality between the sexes could only be achieved when females acquired masculine traits and when males softened their rough edges.

Enter today's problem. Psychologists who now believe that our boys are in trouble attribute their current trauma to both the traditional sex-role stereotypes attacked by feminists and to the androgynous society proposed to rectify them.

For starters, they claim that our sons themselves are the victims of these stifling traditional sex stereotypes. According to the boy advocates, the traditional male-sex roles that feminists regarded as empowering and entitling men are actually harming males by forcing them to deny their inner selves. And to add insult to injury, society simultaneously endorses traditional male roles while insisting that males reject those stereotypes and embrace the new androgynous look. We want today's boys to become "new men," sensitive and vulnerable New Age guys who respect women and shun macho attitudes about power, responsibility, and sex. We send our boys to schools that encourage, at least for them, the passive and obedient style of girls and punish the more rambunctious ways of boys. But, at the same time, we still want our sons to be cool dudes—the sort of "real men" portrayed in traditional stereotypes.

Cutting the apron strings

Pollack, Gurian, and others also claim that by trying to turn little boys into cool dudes, we insist that they become men far too soon. Boys, they say, are separated from their mothers long before they are ready. We fail to give them the emotional support that they need—which we are willing and eager to provide for our daughters. We do not encourage boys to express their feelings, and we do not provide them with the necessary support for emotional growth. Gilligan, in particular, claims that just as we have been stifling female development, beginning at adolescence, so we are undermining the emotional development of four- and five-year-old boys by insisting

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that they let go of the apron strings at too tender an age. Pollack issues the same warning. Even as adults, he warns, males "still unconsciously long for connection with the mother and the nurturing 'holding' environment she once provided."

Gurian's claim is more extreme. He warns that boys are, by nature, more fragile than girls and less able to withstand a hostile world. Evolved over the millennia to be hunters, not lovers or nurturers, males are less capable of emotion and of forming deep personal relationships without persistent tutoring. We should not be lulled into the illusion that boys have it made or, as feminists have claimed, that this culture is run by, and made for, males. Men who, as adults, are preoccupied with the pursuit of money, status, or some other real or illusory power, are only trying to fill the empty void inside themselves that is the result of our cruel demands that a little boy should just shape up and "take it like a man."

Just the facts

If our boys are in a terrible state, this is indeed news that we must hear. But are they really in dire straits? Are we witnessing an emotional and behavioral epidemic among young males? The evidence suggests, not surprisingly, that some boys are in trouble. But the proportion of boys actually suffering from a recognized disorder is small. And boys do not have a monopoly on growing pains. Girls are more likely than boys to display several of the problems cited by the boy advocates, as well as others.

Is it primarily male children who are suffering from low self-esteem? In fact, both males and females experience fluctuations in self-esteem according to questionnaires, interviews, and children's spontaneous conversation with peers. Children's self-esteem is high in kindergarten, then falls during the first few years of primary school, after which it recovers. Another dip in self-esteem occurs in seventh and eighth grades, when puberty, coupled with a burst of cognitive development, causes young teen-agers to become especially sensitive to how they measure up against their peers and how they are perceived by people generally. These dips in self-esteem are only temporary and are part of growing up.

Sex differences in self-esteem have been reported. But it is

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males who tend to have slightly higher self-esteem than females. Boys and girls also evaluate themselves differently. For instance, boys are more confident in mathematics and sports while girls rate themselves as more competent in reading and music. Men's self-esteem usually depends upon whether they believe they have achieved distinction in their lives, whereas women's self-esteem is more closely related to fulfillment in their personal relationships.

Another way of gauging children's self-esteem is to determine whether a child is anxious about how he compares with others. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) describes a group of children who worry chronically about how others evaluate them in academic, athletic, and social activities. Approximately 2 percent to 3 percent of children exhibit this kind of anxiety, and the syndrome is more common in girls. Thus there is no evidence that boys or men suffer from low self-esteem *en masse*. If there is a self-esteem problem, it is mainly found among girls, as many feminists have pointed out.

Do today's boys undergo emotional upheaval because their mothers distance themselves from their sons too soon? According to the DSM-IV, "separation anxiety"—in which a child shows signs of distress at the parents' departure—is experienced by only 1 percent to 4 percent of children. Such youngsters typically come from close-knit, warm families that encourage dependency. So there is no epidemic of separation anxiety brought on by heartless, cold mothers.

Nor are hordes of young boys sleepwalking through life in a depressed state. According to the DSM-IV, only 2 percent of boys show signs of depression. There is no pattern of sex difference in rates of depression in children. So, again, if we have a boy problem, then we have a girl problem too. Levels of depression do increase considerably in adolescence: 3 percent to 8 percent of adolescents suffer from clinical depression. But these are mostly girls.

Boys are more likely than girls to be diagnosed with a variety of behavioral problems. For instance, the DSM-IV reports that from 2 percent to 16 percent of children consistently "act out"—that is, obstinately oppose authority figures. This behavioral problem surfaces at eight years of age and is

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more prevalent in males before puberty. In adolescence, the rates are equal for boys and girls. But boys are more confrontational than girls, and boys persistently display the symptoms. Similarly, 6 percent to 16 percent of boys, and 2 percent to 9 percent of girls, under the age of 18, are diagnosed with "conduct disorder." Such behavior includes fighting, stealing, vandalism, and general aggression.

Furthermore, in adolescence, boys are responsible for more delinquent behavior than are girls. It is also a truism that regardless of culture, time, or species, males are more aggressive than females. Males are predominantly responsible for criminal activity, no matter where one looks. Thus aggression in males is not a new development; rather, it is typical of males. If boys are in trouble because they are aggressive, then they have always been, by definition, in trouble.

It is also true that boys are four to five times more likely to die following a suicide attempt; but 80 percent to 90 percent of *attempts* are made by girls. The different success rates result from the different methods that are employed by boys and girls who try to commit suicide. Boys are more likely to use guns while girls take overdoses or employ other less efficient methods. In a study by psychologist Peter Lewinsohn, 10 percent of adolescent girls and 4 percent of boys reported making a suicide attempt. These are, of course, horrifying figures. But once again, it is clear that suicide, like so many other behavioral problems among youth, is not peculiar to males alone.

What should we make of these statistics? Each of the problems described by the boy advocates is exhibited by some boys. But so do girls display these behaviors, and often in equal or greater numbers. And girls have troubles of their own, as reflected in higher rates of eating disorders that rarely turn up in boys, higher rates of depression and attempted suicide, lagging performance in math and science in school, and greater willingness to give up in the face of failure. The moral: Boys and girls face somewhat different life challenges.

The insignificance of gender

There is no evidence of an emotional or behavioral epidemic for either sex. Only a small minority of boys and girls is

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afflicted by the kinds of problems described by the boy advocates. Where reliable statistics are available, the proportion of children displaying such behavioral and emotional difficulties typically ranges from 1 percent to 4 percent. The exceptions during childhood are various kinds of aggressive behavior in boys. The numbers increase for adolescents, although even here, only a small minority of young people is involved. Nor is it obvious that adolescent behavioral and emotional disruptions are a contemporary anomaly. Anna Freud observed over 50 years ago that adolescents behave in ways that, if exhibited by adults, would be classified as pathological.

Indeed, the dire warnings of the boy advocates are powerfully contradicted by Ed Diener of the University of Illinois, who finds that most people, males and females, are actually pretty happy with their lives. Further, Diener concludes that gender differences account for only 1 percent of the variation in people's sense of well-being. These findings remain consistent throughout the world. Eighty percent of men and women representing 55 nations say they are at least fairly satisfied with their lives. In North America, 90 percent of men and women view themselves as "pretty happy." Neither does age influence happiness. Fifteen-year-olds, the youngest subjects in the study, are as likely to be happy as 65-year-olds, or anyone in between. If we are witnessing an epidemic of boy trouble, it is not showing up in the subjective experience of adolescent and adult males.

The fact that, regardless of age, sex, nationality, ethnicity, or social status, most people are satisfied with their lives is a testimonial to human resilience. To proclaim that boys are too fragile to face, and triumph over, such challenges as heading off to kindergarten is suspect. But if we buy into the fantasy that boys are china dolls, we risk eventually making them into just that.

In the final analysis, the failure of gender to account for happiness should not surprise us. We make such a fuss about the differences between males and females that we forget an important fact: Gender accounts for between 2 percent and 5 percent of the differences between people with regard to virtually every emotional, behavioral, and cognitive trait. Even with respect to aggression—where the most robust sex differ-

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ences are reported—a person's gender is responsible for only 5 percent of the difference. This means that general human variation is usually the result of such factors as genetic heritage, temperament, child-rearing experience, personal values, attitudes toward life, and so forth and so on. Sex, in the final tally, just doesn't count for much.

Yet, even if there is no epidemic of boy trouble, we should not ignore boy—or girl—problems or endorse antisocial or destructive behavior in males simply because, as the adage would have it, "boys will be boys." But are the boy advocates right? Are traditional sex roles, emotional neglect by mothers, and psychic frailty hurting at least some of our boys?

Sex-role stereotypes

For both boy advocates and feminists worried about the state of our girls, sex-role stereotypes have been a perennial target. Both believe that traditional sex roles are stifling. Feminists lobbied for androgyny as the solution and tried to persuade parents to raise their sons and daughters in a gender-neutral manner, encouraging a child to adopt the best traits from both the traditional male and female stereotypes.

The evidence, however, does not support these suppositions regarding the relation between sex roles and personal well-being. It is traditionally masculine traits, such as independence, mastery, task accomplishment, and assertiveness, and not the feminine traits of nurturing, cooperation, emotional openness, and sensitivity to others' needs, that predict good mental health. To the degree that androgynous people are behaviorally well adjusted, this appears to be because of the masculine component of the androgynous profile. So androgyny would not seem to be the solution to boys' (or girls') troubles.

What is more, both males and females constantly display both masculine and feminine traits in the real world. Each sex calls on the trait appropriate to the particular situation. That is why sex is so unimportant in accounting for the differences that we observe among people. Males can be cool dudes and sensitive New Agers, and so can females. There is no reason to think that we can effectively treat boys in trouble by purging them of traditional masculine traits.

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Mamma's boy?

Boy advocates also claim that where we find boys in trouble, at least some of the blame rests with the way in which mothers raise their sons. They contend that parents treat their male and female children differently, and that it is this inconsistency that causes differences in the behavior of boys and girls. It is true that when adults do not know a particular infant or child, they tend to respond to the youngster on the basis of sex. This makes good sense. Adults are relying on their knowledge about what boys and girls are typically like in the absence of information about the particular child they encounter. But two major reviews summarizing the results of 195 studies found little evidence in support of the idea that boys and girls are treated differently by their parents. Whatever the category—amount of interaction between parent and child, degree of warmth and nurturing directed toward the child, encouragement given in regard to achievement or dependency, level of disciplinary strictures, and clarity of communication with the child—boys and girls are treated pretty much alike. The demands of caring for infants and young children are such that this should surprise us.

Are mothers somehow stifling the emotional growth of their sons, as Pollack, Gurian, and Gilligan claim? The evidence indicates otherwise. For instance, mothers respond differently to expressions of emotion in their sons and daughters. But the difference seems to indicate that mothers are more sensitive to the feelings of their sons. In particular, mothers respond reciprocally to their sons' emotional expressions. For instance, if her son is smiling, the mother usually smiles in response. Mothers often do the opposite with their daughters. Mothers also respond reciprocally to their sons' expressions of anger while frequently ignoring similar expressions in their daughters. If anything, such responsiveness should encourage emotional expressiveness in males. Nevertheless, by adulthood, males are less expressive than females.

There is reason to believe that we are witnessing here an inborn difference between males and females which persists regardless of parental behavior. In cases where the mother treats her children differently, it is often in response to sex-based differences between children. For example, as early as

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six months of age, girls are already much more responsive to their mothers than boys, in spite of the fact that nothing in the mother's behavior seems to evoke such a difference. It is evidence of this sort that Gurian relies upon to support his claim that males are emotionally disadvantaged at birth. This is a subjective judgment, to say the least. Males and females tend to express emotions differently. It is just as easy to claim that *females* are emotionally disadvantaged because they are too expressive as it is to claim that males have emotional problems because they are less expressive. What we need is a standard for judging the desirability of traits such as emotional expressiveness. The standard most relevant for this debate is whether particular traits interfere with the individual's health and happiness. And we know that differences in sex have virtually no effect on a person's happiness and sense of well-being. So the theory that the emotional reserve of males is an unhealthy trait has no concrete support.

Mothers do not neglect their sons' emotions. Rather, parents tailor their behavior to the particular traits of the individual child with whom they are interacting. Where we do find differences in treatment by mothers, these differences, if anything, encourage emotional expressiveness in boys, not girls. Boys and girls, nevertheless, appear to respond differently to the people around them. Why these differences lead the boy advocates to assert that boys are emotionally disadvantaged is a mystery.

Bad boys

If there is any truth to the claim that our boys are in trouble, it is owing to their aggressive tendencies. Boys who seriously misbehave in school frequently commit crimes out of school. Aggressive behavior is also a precursor and predictor of school drop-out rates, antisocial behavior, delinquency and criminality, and suicides. So, while there is no evidence of an aggression epidemic in today's boys, it is clearly in the interest of boys themselves, and of the rest of us who must deal with them, to address destructive aggression early.

No one disputes that there is a male-female disparity in levels of aggression. This difference remains constant across time, cultures, and species. Evolutionary psychologists trace

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the difference to the male role of hunter and protector. We see this difference acted out in the universal fondness that boys, but not girls, have for rough-and-tumble play. Adults often try to discourage this kind of play, but boys nevertheless persist in it when not being monitored.

While substantial male-female differences exist in levels of activity and aggression, it is also true that certain kinds of family environments can exaggerate aggressive behavior in boys. Gerald R. Patterson of the Oregon Social Learning Center has studied disruptive aggression in boys for four decades and finds that aggressive boys tend to come from a certain kind of family environment. Parents of aggressive boys tend not to take an interest in their sons' friends and do not keep track of their activities. Aggressive boys tend to have parents who use halfhearted and inept disciplinary techniques. They threaten, scold, and nag without backing up their threats with effective action. Families of aggressive boys employ confrontation instead of negotiation to resolve conflicts. As a result of this disciplinary approach, aggressive boys tend to interpret the intentions of others as malicious, when in fact they are not.

Once a pattern of aggression is established, it often leads to other problems. Parenting practices per se are not the best predictor of adolescent and adult problems, such as delinquency, criminality, and drop-out rates. Rather, it is the level of childhood aggression that predicts these outcomes. Early styles of parenting can reinforce a pattern of aggression in childhood which, in turn, encourages later forms of destructive behavior.

Parents of aggressive boys may practice their particular style of child rearing, in part, because their sons are temperamentally difficult. Patterson notes that aggressive boys tend to be coercive, obstinate, less responsive to positive reinforcement, and more impulsive, and there is evidence that these traits precede any child-rearing techniques employed by adults. Thus it may be that parents, faced with problematic children, become ineffective socializers. It is possible to improve the behavior of such children, by establishing firm, rule-oriented parental control. When parents begin to consciously adopt such tactics, confrontations among family members may decrease, and more effective conflict resolution and problem-solving prac-

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tices become possible. Relations between parents and children then can become more affectionate.

Interestingly, Patterson finds that a parental emphasis on rule following works for boys but not for girls. Boys appear to need structure more than girls. Thus discipline and monitoring help to minimize disruptive aggression in males but not females. Girls, on the other hand, are more affected than boys by a lack of positive reinforcement, especially from their mothers. To the extent, then, that parents lay down the law for boys more than for girls, it's a good thing.

It would also be a good thing if we took more seriously the need boys have for a father. Male children are typically less compliant than their sisters, and women have trouble controlling them. Hence the familiar refrain of mothers everywhere: "Wait 'til your father gets home." Across cultures, in families where fathers are absent, boys are more likely to display aggressive, antisocial behaviors. It is principally men, not women, who moderate the aggressive impulses of boys. Thus feminists who argue that there are no real male-female differences, and who encourage women to raise children without males in the house, are courting disaster. The probable result is that the most disruptive of sex-linked male traits, destructive aggression, is exacerbated.

Nature vs. nurture

There is a driving ideology behind the boy advocate's movement. It is that children can be molded, for good or evil, by the people and world around them. So, if we only modify those nasty sex-role stereotypes, or persuade parents to treat their children in a particular way, we can alter the emotional and behavioral repertoire of boys in desirable ways. Parenting styles do influence children in important ways. But the notion that children can be trained to display this or that trait is news to most developmental psychologists and, I would bet, to most parents. Children do not passively suck up whatever the world has to offer, blindly adopting any behavior that is encouraged by parents or teachers. Rather, they respond uniquely to the same outside stimuli, filtering the input from their surroundings in sex-linked ways.

What is more, parents do not try to encourage sex-linked

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behavior to the degree that people often assume. Indeed, on occasion, we find that parents try to pressure children to behave in one way, but the children persist in acting in the exact opposite fashion. For instance, adults in America spend more effort punishing aggression in boys than in girls, but males remain the more aggressive sex.

The fact is that, contrary to the assumption of the boy advocates, sex differences appear to be a fact of life. They persist over time and across cultures. It is always possible that *all* cultures are sexist, and in precisely the same way. But to many observers of human behavior, this cross-cultural uniformity is taken to say something about human nature. Furthermore, the striking similarity between the sex-linked behavior of humans and other primates is prima facie evidence that human sex differences cannot be a function of culture alone.

The maxim that "boys will be boys" reflects this reality. Extreme sex-linked behavioral problems, such as disruptive aggression in males, can cause trouble, and clearly there is wisdom in wishing to clamp down on such behavioral abnormalities. But there is only so much that parents and others can do to influence the behavior of children. The boy advocates, who are disturbed by the differences between males and females, want to persuade us that normal male traits are personality disorders. This is clearly wrong. We should acknowledge that the sexes are different and work with what nature has provided.

Raising Hamlet and Ophelia

Let me end on a personal note. As a mother of a teen-age son, and as a professor who has been teaching, and conducting research in, developmental psychology for over 20 years, I am appalled by the message being spread by the boy advocates. The cause that they are promoting seems to me to be motivated by an unholy alliance of psycho-babble, victim advocacy, and an insidious mutation of recovered-memory propaganda. Our boys are in trouble, say the advocates, even if we don't realize it. And if our boys don't realize what terrible shape they're in, well, they're just in denial!

I am not arguing that every boy or girl is a happy child. Clearly, we should help particular children who are having a

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hard time. But here is why the boy advocates worry me. They are in danger of causing good parents of healthy boys to have nagging doubts about their own competence and about the well-being of their sons. And they are in danger of seducing us into interpreting sex differences as personal deficiencies. In a twisted kind of way, the boy advocates have taken us full circle in the competition between the sexes for victim status. Once upon a time, as feminists say, society viewed the feminine traits of nurturing, dependence, compliance, and emotional expressiveness as not only different from but inferior to masculine traits. Now it is the boys who are disadvantaged. When we find differences between males and females in how they meet life's opportunities and challenges, why can't we simply accept them as differences and make the necessary accommodations?

The boy advocates scare me for a final reason. Adults who buy into the notion that children, of either sex, are fragile will be more likely to deprive youngsters of the chance to face and overcome life's challenges. Clearly, we should not throw children out into the cold, cruel world to sink or swim. Emotional support—what developmental psychologists like to call "warmth"—matters. But children who never meet a challenge will never feel the satisfaction of accomplishment. Maybe the hole that Gurian finds inside of boys is the result of our depriving them of the opportunity to overcome the problems that confront them. Children who never get to do anything hard are likely to grow into adults who cannot manage life's tougher moments, which call for emotional strength and discipline. No wonder we have become a society of victims!

Are children capable of facing challenges and living to tell the tale? Of course they are. Across time and place, youngsters have triumphed in the face of hardships that are difficult for most of us to imagine today. Children have lived through war; they have survived abject poverty; they have worked 18 hour days at the age of five or six in the foulest conditions. Am I advocating that we build more of this kind of experience into the lives of our children today? No. But I do think that it is instructive to remind ourselves of what children have endured. Sending an apprehensive child off to kindergarten is rather innocuous by comparison.

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My advice to the boy advocates is to read less Freud and more history. They would gain more respect for children's resiliency. They might even learn to appreciate the difference between raising boys and raising girls.

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Courting disorder in the schools

ABIGAIL THERNSTROM

WHEN twelve students and a teacher were shot dead in the Columbine High School massacre, public alarm (abetted by the media) was inevitable. In a *Newsweek* poll immediately following the killing, 63 percent of Americans said that it was "very or somewhat likely that a shooting incident could happen in their schools." In fact, however, such shootings remain rare—and thus newsworthy. Fewer than 1 percent of homicides involving school-age children actually occur in or near schools, according to the Centers for Disease Control. When kids are killed, it's almost always elsewhere. "Have you ever ... had a weapon such as a gun or knife, pulled on you at school?" California students were asked in a 1998 survey. Only 2 percent answered yes.

Nevertheless, schools are hardly islands of tranquility. In that same California poll, students were asked to name "the most important problem" facing their local school; 32 percent

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said "crime/gangs/violence/drugs." Just plain disorder, incivility, and disobedience should have been added to the list. In the academic year 1989-90, *New York Newsday*'s education reporter, Emily Sachar, taught eighth-grade mathematics at the Walt Whitman Intermediate School in Brooklyn, New York. Many kids, she discovered, had never been taught how to sit still, how to control what they said, how to behave. Her students called her "cuntface," told her "to fuck off," spat in her face, played radios during class, and threw chairs at one another. Even if a majority wanted to learn, a small group of troublemakers could turn the room upside down in minutes. Sachar's story is hardly unique. A parent participating in a Public Agenda focus group in the winter of 1997-98 reported after visiting a Cleveland middle school: "I didn't want to go in.... The school was a madhouse; it was filthy. Who's in control here? The kids?"

Such stories (easy to come by) are supported by some data. In a 1991 survey, 58 percent of secondary-school teachers said they had been verbally abused at some point in their teaching career—23 percent in the four weeks prior to the poll. Where there is verbal abuse, there are usually fights, vandalism, gangs, and drugs as well. The point is a variation on James Q. Wilson's well-known "broken windows" thesis: Ignore the small stuff, and serious crime gets a green light. If the national picture is consistent with that in California, only a small percentage of individual students (across all grades) have actually had a knife or gun pointed at them. But other data suggest that only a minority of schools are entirely crime free. The National Center for Educational Statistics (NCES) surveyed schools in the academic year 1996-97; 57 percent reported at least one crime to the police. Since rapes, robberies, physical attacks or fights involving a deadly weapon, and other forms of serious crime—at least some of which goes unreported—seldom occur in elementary schools, the secondary-school picture must be considerably worse than the 57 percent total suggests.

The headline-grabbing shootings in Colorado, Kentucky, Mississippi, Arkansas, and Oregon in the past two years have all been in suburban schools, perhaps, in part, because they had not installed the extraordinary range of security measures one finds in many urban schools—photo ID cards worn around the

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neck, video cameras, undercover and regular police, drug-sniffing dogs, and, of course, metal detectors. But such measures are concentrated in inner-city schools because the problem of crime—to say nothing of disorder—is indisputably greater in urban settings, particularly those with high numbers of minority students.

Thus, in the 1996-97 school year, the rate of serious violent crime was 19 per 100,000 students in 95 percent white schools, but 96 in schools with at least 50 percent minority enrollment. A fall 1996 survey found that 41 percent of black high-school students, as compared with 27 percent of whites, felt that disruptive students were a "very serious problem" at their school. The disparity is important because, on average, black and Hispanic students are academically far behind whites and Asians. Violence and disorder surely affect the level of learning. "Serious and nonserious offenses [are] negatively related to gains in achievement," a 1998 Educational Testing Service study concluded. Parents and teachers put the matter more simply. "My kid hates the school. She is scared," a mother of a tenth-grader at the overwhelmingly black Dorchester High School in Boston reports. Scared kids who hate school are not likely to learn much. And teachers who must deal with even a small minority of disruptive students are not very effective. In 1997, a new and frustrated Los Angeles high-school teacher described her English class as "nine-tenths policeman, one-tenth educational."

Everyone has lawyers

Every teacher knows that students cannot learn in chaotic and threatening classrooms. Why, then, is the problem not more effectively addressed? A parent in Haddonfield, New Jersey, had her own answer: "They're terrified of lawsuits."

"Everyone has lawyers today, and that is why we have an elaborate structure established as far as disciplinary hearings," the president of the Cambridge (MA) Teachers Association told a *Boston Globe* reporter. Eugene G. Liss, a lawyer who represents teachers in Newark, has estimated that 20 to 40 teachers in his district face criminal charges every year, many of them presumably baseless. And criminal suits are frequently supplemented by civil ones. In Montclair, New Jersey, a teacher

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merely grabbed the arm of a fifth-grader who had been hurling grapes in the lunchroom; the parents filed a suit, and the teacher lost his job. When a teacher in a nearby district tried to explain the consequences of misbehaving, a second-grader riposted, "There's nothing you can do because I'll call DYFS"—the Division of Youth and Family Services, which can refer complaints to police or prosecutors. "As soon as they get into a confrontation with a teacher, they make up a story and go to DYFS," the president of a local teachers union remarked. The DYFS receives about 300 complaints a year.

In the course of outlining what teachers can and cannot do, Liss said: "You can't humiliate kids.... You can't badger, humiliate or harass." But what precisely does this mean? If the law were clear, the answer would be readily available. But it is not. What *is* clear is that students now have rights previously inapplicable to them. True, these rights are more limited today than they were 20 years ago. However, the precise line between permissible and impermissible disciplinary action has never been drawn.

There is still another complicating factor. Students who qualify for special education are exempt from long-term suspensions, expulsion, and other severe measures, and these protections undoubtedly shape disciplinary strategies for ordinary students as well.

The Supreme Court steps in

Once upon a time, in an altogether different era, the disciplinary powers of schools were quite clear. There was a seamless line between parents and teachers—the latter serving, literally, as *in loco parentis*. The teacher's authority began when the student left home in the morning and lasted until he returned home. Thus "most parents would expect and desire that teachers would take care that their children, in going to and returning from school, should not loiter, or seek evil company," the Vermont Supreme Court held in 1859. Over the next century, this doctrine changed. Discipline came to be seen in a wider context—as a means by which the mores of the larger society were inculcated. But the notion of societal values in conflict—the civil liberties of students versus the institutional order—is of relatively recent origin. In fact, not

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until the *Tinker* decision in 1969 did the U.S. Supreme Court sharply limit the authority of schools.

Tinker v. Des Moines Independent Community School District involved three students who wore black armbands as a gesture of protest against the Vietnam War. They were suspended in accordance with the school's policy, of which they had been warned. Both the federal district court and the Court of Appeals for the Eighth Circuit upheld the suspensions. The Supreme Court, however, reversed. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Justice Abraham Fortas wrote in an opinion joined by four other members of the Court. "In our system," he argued, "state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."

Tinker did raise a legitimate First Amendment question, but the Court's politically charged rhetoric obscured what was at stake. No one had suggested that schools should be, or had ever been, "enclaves of totalitarianism," or that their authority was "absolute." The issue, as Justice Potter Stewart noted in his concurrence, was whether "the First Amendment rights of children [were] co-extensive with those of adults," as five members of the Court seemed to think. The reasoning of the majority was vulnerable in another respect. Fortas placed great emphasis on the fact that only three students had participated in the protest—a number too small to pose a true disciplinary problem. The learning process had not been disrupted. And indeed, the "discomfort and unpleasantness" elicited by the promulgation of unpopular views is the price Americans must pay if they are to preserve their "independence and vigor" in a "relatively permissive, often disputatious, society."

Had the students been skinheads, donning swastikas, would the Court have ruled differently? And what if 500 students had joined the antiwar protest? At that point would democratic "discomfort" have become an intolerable disruption? The Court did not say. Fortas could have simply limited himself to the facts of the case—students expressing their political views in a silent, symbolic, and nonviolent manner. But instead, he celebrated conflict and permissiveness, even within the school-

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house walls, as if the future of democracy and American institutions would have been jeopardized had the students been forced to doff their armbands.

The Fortas opinion, of course, carried the day, but it did not convince Justice Hugo Black—normally a staunch defender of First Amendment rights. Black viewed excessive permissiveness, not a disciplined social order, as the real threat to democracy. "I have never believed," he said, "that any person has the right to give speeches or engage in demonstrations where he pleases and when he pleases." When students in state-supported schools "can defy and flout orders of school officials ... it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.... Uncontrolled and uncontrollable liberty is an enemy to domestic peace." With this decision, Black believed, the authority of teachers had been eviscerated. The courtroom doors had been cast open to litigious, immature, obstinate—even violent—students, now depicted as oppressed freedom-fighters by the Court. What had begun as merely a few black armbands would go on to empower students who were already "running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins," Black warned.

A more vivid clash of cultures in a Supreme Court decision is difficult to find. But the deep division on the Court, as is so often the case, mirrored the splintering of society as a whole. Protest—even civil disobedience—had acquired an unprecedented moral standing as a consequence of the civil-rights movement and opposition to the Vietnam War. And yet, for many Americans, the massive antiwar demonstrations in 1968, as well as the four long, hot summers of rioting that began in a black ghetto of Los Angeles in 1965, were ominous signs of the political culture unraveling. In addition, the rate of violent crime had gone up by a stunning 25 percent between 1960 and 1965 and was still climbing sharply when the Court heard the *Tinker* case.

Backlash was setting in—indeed, had already set in. In 1966, the Republicans gained 49 seats in the House of Representatives and six in the Senate; eight governorships also switched from Democratic to Republican hands. A September, 1968 poll found that 81 percent of the public felt that "law and order [had] broken down." Two months later, Richard Nixon

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won the White House stressing precisely that theme. Fortas thought that student demonstrations confirmed "the independence and vigor of Americans," but Black understood that independent and vigorous Americans had not endorsed social chaos. Black, along with most Americans, believed that "school discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."

Rights revolution

Tinker would allow students and parents to construe every school disciplinary action as a subject of judicial interpretation, Black warned. Most school-discipline cases never reach the Supreme Court, but in *Goss v. Lopez*, decided in 1975 (six years after *Tinker*), the Court, just as Black had feared, dramatically extended the rights of public-school students.

Goss involved suspensions from high school for up to 10 days without a hearing—a disciplinary action the Court declared unconstitutional. Students who faced temporary suspension from a public school have property and liberty interests that are protected by the due process clause of the Fourteenth Amendment, Justice Byron R. White argued, writing for a majority of five. Public education is a property interest—a right to a benefit embedded in Ohio law—and the state "may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." Moreover, "where a person's good name, reputation, honor or integrity is at stake," due process must be observed. Wrongful exclusion from school is a "serious event"; effective notice and an informal hearing would provide "a meaningful hedge against erroneous action." And, while the Court in this case demanded only informal procedures, it also held that "longer suspensions or expulsions ... may require more formal procedures"—an ominous sign of possible future rulings.

Again the Court was deeply divided; four members dissented. "The decision unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education," Justice Lewis F. Powell, Jr., wrote. "For the first time," the Court has granted

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to the judiciary "the authority to determine the rules applicable to routine classroom discipline." Equally troubling to Powell was the foundation upon which the case for judicial intervention was built. The Court, he said, seems to have adopted the sentiments of the district court, which concluded that a suspended student might suffer psychological injury—for instance, a loss of "self-esteem" or a sense of being "powerless." By this logic, discipline—of any sort—was harmful. And yet, as Powell put it, "Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto."

Once again, the larger culture war was displayed in a Supreme Court decision. Powell spoke despondently of living in "an age when the home and church play a diminishing role in shaping the character and value judgments of the young." Having supplanted these age-old institutions, the school would have to become the place where America's youth learned self-discipline and a respect for rules. But the lower court had depicted psychologically vulnerable students at the mercy of stern authorities who make erroneous or unfair decisions, and Justice White had conjured up the image of schools as institutions with potentially "untrammeled power." Suspension—even for just one day—was a "serious event" that deprived students of their right to an education, White had argued. Powell believed precisely the opposite: He assumed that suspensions were necessary to create an environment in which students could learn.

By a slim majority

The invitation extended by the Court in *Tinker* was taken seriously. It inspired hundreds of suits filed by pupils alleging violations of their constitutional rights by rules regulating, among other things, dances, student elections, hair length, movies, textbook selections, school plays, and newspapers. The due process protections specifically guaranteed by *Goss* were minimal, but the decision inexorably rolled out the welcome mat. And yet, there was a limit beyond which even the Court—by a slim majority—was not willing to go. That limit was delineated in a case decided in 1977, two years after *Goss*.

The central issue in *Ingraham v. Wright* was the Eighth Amendment's ban on cruel and unusual punishment. Florida

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law still allowed corporal punishment, and two junior-high students, who were paddled on the buttocks, decided to sue. The Court was again split five to four, but, in this case, the school prevailed. Indeed, it was Powell, the author of the *Goss* dissent, who delivered the majority opinion.

The Eighth Amendment protects citizens against torture, excessive bail, and other severe actions imposed upon those convicted of crimes, Powell said. The plaintiffs' claim was a flagrant distortion of the Constitution's scope, he suggested. (The death penalty, it's worth remembering, does not violate the Eighth Amendment.) The argument extended Powell's point in *Goss*: School suspensions were not the equivalent of criminal arrests, and a paddling was not torture. In addition, "in virtually every community where corporal punishment is permitted in schools, [existing] safeguards are reinforced by the legal constraints of the common law." Teachers inflicting excessive punishment are liable to criminal and civil prosecution. This was the legal argument, but Powell had a greater concern, evident in his *Goss* dissent. "Disciplinary problems [were] commonplace in the schools." Were courts to become assistant principals, deciding, on a case-by-case basis, how best to respond to student misbehavior?

It was the right question, but the answer was already clear. As much as Powell would have preferred to let elected officials, administrators, and teachers run the schools, issues pertaining to routine disciplinary procedures had been irrevocably constitutionalized. The difficulty was that even Powell had to acknowledge that punishment could be "unreasonable," and given the sweeping definition of individual rights and judicial power that began with the Warren Court, courts would inevitably play a fundamental role in defining the acceptable and unacceptable. Moreover, deference to institutions of authority had gone out of fashion throughout much of American culture. The disciplinary prerogatives once given to schools could never again be exercised. Thus while *Ingraham* was a victory for the defendant—although by the slimmest of Court majorities—it would not discourage future plaintiffs. The Court's reading of the Eighth Amendment was a legal sideshow that would have little impact on constitutional claims that rested on less dubious grounds.

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"Reasonable" searches

If the Eighth Amendment was, and remained, an unlikely means of constitutional redress for student grievances, the same could not have been said for the Fourth Amendment, which the Court had already expansively interpreted. By the mid 1980s, the argument that students had absolutely no right "to be secure in their persons ... papers, and effects" would have been dead on arrival. But what were the Fourth Amendment's precise dimensions in the educational context? That was the question in *New Jersey v. T.L.O.*, a 1985 Court case.

T.L.O. involved a freshman in a New Jersey high school who had been found smoking in the bathroom. When she told the assistant vice-principal that she never smoked, he demanded to see her purse. Upon opening it, he discovered not only a pack of cigarettes but evidence that she was selling marijuana at school. The student subsequently confessed, but the New Jersey Supreme Court ruled that the search was unreasonable and ordered the evidence to be suppressed in juvenile court. The U.S. Supreme Court reversed.

The Fourth Amendment provides protection only against "unreasonable" searches and seizures. It requires law-enforcement officers to demonstrate "probable cause" when obtaining a search warrant. But not all government searches require a warrant, and, among those that don't, some need not meet the probable-cause standard. In situations where probable cause is too high a standard, the question becomes: When governmental interests are weighed against the individual's right to privacy, does the search appear to have been reasonable?

School officials are representatives of the state and thus subject to Fourth Amendment constraints. But they need not obtain a search warrant, the Court held in *T.L.O.* Nor do they have to show probable cause in justifying a search. Schools have a "legitimate need to maintain an environment in which learning can take place," Justice White wrote for another majority of five. "In recent years, school disorder has taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." A reasonable search—one that is rational in its purpose and not excessively intrusive—is legal.

Justice William J. Brennan, Jr.—joined by Justice Thurgood

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Marshall—called the Court's standard "unclear." When were searches "reasonable" and permissible in scope? Judges were engaged in what Brennan called a "Rorschach-like 'balancing test.'" *T.L.O.* left more questions unanswered than it resolved, ensuring subsequent Fourth Amendment litigation. Only one thing had been settled: Both students and schools were vulnerable—students to searches, schools to endless litigation challenging those searches.

The majority opinion, in a footnote, warned that the Court had not addressed the question of whether students had legitimate expectations of privacy in "lockers, desks, or other school property." But most subsequent lower court decisions gave teachers and principals considerable rights to search students they suspected of wrongdoing. That power was confirmed in the Supreme Court's 1995 decision in *Vernonia School District 47J v. Wayne Acton*, which upheld the random drug testing of student athletes. The Fourth Amendment usually allows searches only when an individual has acted in a suspicious manner, but this constraint could be overridden by a state's compelling interest in combating a serious drug problem, Justice Antonin Scalia concluded for a majority of six. "That the nature of the concern is important ... can hardly be doubted," he wrote. "Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs."

With the Court decision in *Vernonia*, the power of schools to conduct "reasonable" searches—even random ones—would seem to have become clear. Thus schools with a demonstrable problem and a carefully tailored search policy have been allowed to conduct suspicionless searches by means of metal detectors. Yet the door has not been closed on Fourth Amendment suits. Details differ from one case to another, and the murky standard of "reasonability" is an invitation for judicial reinterpretation. Thus litigation remains an enticing option for many. There will always be plaintiffs, lawyers, and judges who have a new perspective on an old problem.

Schools have been given considerable discretion to engage in both random and targeted searches, and that power undoubtedly prevents some students from bringing weapons and drugs into the building. But the sheer number of lawless kids

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can overwhelm any security system, as the NCES survey on school violence suggests. Moreover, the right to conduct reasonable searches may cut down on violence and theft, but it does not solve such disciplinary problems as disobedience, verbal abuse, vandalism, fist fights, sexual assault, and general disorder. Much more important than the right to inspect a student's purse is the right to remove students from the classroom or school in which their conduct is unacceptable. Short-term suspensions are easy, provided minimal due process rights are observed, but long-term suspensions and expulsions are at best a hassle and at worst a nightmare. Teachers are vulnerable to both criminal charges and civil suits.

"Disability" as a civil right

America is a litigious society, and schools are inevitably enmeshed in the legal web woven not only by judicial rulings but also by the statutes and regulations drafted to interpret them. The legal rights and prohibitions resulting from legislation are arguably the true impediments to school discipline. In 1975, Congress passed the Education for All Handicapped Children Act, and since then, students with a multitude of disabilities, including those with a "serious emotional disturbance," have been nearly exempted from standard disciplinary procedures.

Federal protection for disabled youth, now extensive and costly, got a quiet and innocuous start in 1966, when Congress added Title VI to the Elementary and Secondary Education Act (ESEA), passed the year before. The amendment was mainly an appropriations measure, providing money to the states for plans designed "to meet the special educational and related needs of handicapped children." But already, "handicapped" was to include the "seriously emotionally disturbed"—a decision of great import for the future.

The ESEA was further modified in 1970 by a package of amendments known as the Education of the Handicapped Act (EHA). The statute was still primarily a funding measure, and states retained considerable power to shape their own programs. But that power began to erode in the early 1970s, partly because two judicial decisions made education—even for the "emotionally disturbed" child—an entitlement that "must

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be made available to all on equal terms." In *Tinker*, the Supreme Court had overturned the suspension of student antiwar protesters. Three years later, in 1972, a federal district court ruled that nearly all children had the right to attend school. Public education, even for children with a "mental, physical or emotional disability or impairment," had become an entitlement. A child suspended for more than two days was entitled to a hearing, legal representation at the hearing, diagnostic services, and the provision of an alternative education.

Education of the "disabled"—a category that included children with behavioral and emotional problems ranging from the merely hyperactive to the violent—had become a basic civil right. It was a decision soon ratified by Congress. Four ground-breaking bills were passed in the years 1973 to 1975. The first two bills added, and then amended, Section 504 of the Rehabilitation Act of 1973, which gave broad antidiscrimination protection to the handicapped in all federally funded programs. The third bill further altered the Elementary and Secondary Education Act by incorporating language that promised to provide "full educational opportunities for all handicapped children." Among the rights the statute ensured was entitlement to due process hearings when the school sought to change the classroom placement of an emotionally "disabled" child. Moreover, unless totally incapable of learning, even with prodigious supplemental tutoring, such children were entitled to instruction in a "regular education environment."

Congressional action, however, did not stop there. In 1975, it passed the Education for All Handicapped Children Act (EAHCA), renamed the Individuals with Disabilities Education Act (IDEA) in 1990. The 1975 legislation instructed districts to identify all disabled children properly and appropriated substantial federal funds to help states meet their special-education needs. But it also spoke of the "unique needs" of children with disabilities and the necessity of providing extensive protection for their procedural rights. Parents were allowed a role at every step in the evaluation process, and were entitled to an impartial hearing concerning their child's educational placement. Moreover, parents, or the district, could pursue matters further in state or federal district court. As the Supreme Court made clear in a 1988 decision, the emo-

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tionally disturbed child could not be removed for longer than 10 days at any one time. After that brief expulsion, even the dangerous or disruptive child was entitled to "stay put" in the classroom to which he had been assigned. Unless, that is, the unacceptable conduct was totally unrelated to the student's "disability." Or unless the hearing officer or a court approved of another placement—or the parties agreed to one.

A disciplinary nightmare

IDEA remains the principal federal statute that describes the educational rights of the disabled student. Like the statute that preceded it, IDEA protects disabled students in general, including those with a "serious emotional disturbance." The phrase covers a range of children, because the definition of "serious emotional disturbance" is willfully vague. "An inability to build or maintain satisfactory interpersonal relationships with peers and teachers," for instance, is one sign of a disability, although what constitutes a "satisfactory" relationship is never mentioned. And while students who are merely "socially maladjusted" are not protected by the act, the distinction between "maladjusted" and "disturbed" is never given. The statutorily mandated, multidisciplinary team that evaluates a child is left to fill in the blanks.

Thus the evaluation may label as emotionally "disabled" the child who was formerly called "bad" or "wild" or "difficult." Antisocial acts have become expressions of illness. A child who is blind or in a wheelchair needs help, not discipline. The same is now said of the student selling drugs or habitually starting fights.

IDEA is informed by the "illness" paradigm. Districts must create an individualized educational program (IEP) for all children with disabilities—emotional as well as physical—and to the maximum extent possible, they must be educated in regular classrooms. Exceptions can be made "only when the nature or the severity of the disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily."

Unlike regular pupils, special-education students with severe disciplinary problems cannot be expelled or subjected to lengthy suspension if their behavior is related, at least in part,

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to their disability. Thus the child labeled "emotionally disturbed," who throws a desk at a teacher, cannot be permanently kicked out of the classroom unless a psychologist, or another member of his evaluative team, sees no connection between the student's violence and his "disability"—an exceedingly unlikely finding, given the nature of the illness paradigm. Removing a special-education student from a classroom for more than 10 days remains very difficult procedurally, although the original statute has been modified to allow schools to provide alternative placement, for up to 45 days, if a student shows up with drugs or a weapon, or if a hearing officer has determined that the student is dangerous.

The elaborate procedural protections embedded in IDEA mean, as the *New York Times* has noted, that every school "has a story about the problems of disciplining children with disabilities—the wild kindergartner who disrupts classes for everyone else but cannot legally be removed from class, or the gang of youngsters caught selling drugs in which all are expelled except the one diagnosed with a disability." It has long been an issue of central concern to the American Federation of Teachers (AFT). "Many [schools] have become afraid of litigation and financial penalties," Marcia Reback, an AFT spokesman, testified at a U.S. Senate subcommittee hearing in July 1995. "Either because the law was misunderstood or out of fear of litigation, a North Carolina student who broke her teacher's arm was suspended for only two days. When an Oklahoma City student stabbed a principal with a nail, he was suspended for only three days," she went on. Such minor penalties send a message not only to teachers but also to the students.

If schools try to act on behalf of regular students whose education is disrupted by troublemakers, they risk, at best, endless hours compiling a meticulous paper trail, and, at worst, defeat in a courtroom many years down the road. In addition, teachers who cannot punish "emotionally disturbed" children are often reluctant to put their foot down with students who are "socially maladjusted" but have not been classified as disabled. Even if they feel obligated to have different standards for different students, another problem arises: what the AFT has called the "battered teacher syndrome"—the belief that being pummeled, bitten, spit at, pushed, and assaulted comes with the job.

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Schools as battlefields of cultural change

When the first version of IDEA was passed in 1975, "nobody envisioned ... the kinds of discipline problems that are on the table now," Michael Resnick, associate executive director of the National School Boards Association, said in 1997. "And no one anticipated how much the culture would change and how big an issue discipline would become in the schools," he went on.

The vulnerability of the young psyche, damage to which brings dire consequences, is a theme that runs through judicial and legislative decisions protecting disruptive youngsters. As Reback of the AFT explained: "The logic works this way: there is a presumption that any disability causes a loss of self-esteem, and it is this damage to self-image that causes the violent or disruptive behavior." As a result, hearing officers and judges label almost all disruptive or violent behavior a manifestation of one disability or another.

IDEA makes the long-term suspension or expulsion of an emotionally disturbed child exceedingly difficult, and *Goss* and other judicial decisions have ensured due process rights for all students. The power of the federal courts and Congress is now felt in every classroom. Those schools that wish to do so can use metal detectors, surveillance cameras, and other means to discourage violent crime, but it's very hard to get rid of the disruptive students who attend school erratically, wander in and out of classrooms, play their radios and talk to friends, swear at the teachers, taunt other kids, start fights, and do almost no schoolwork. Good principals and skilled teachers, through a variety of strategies, can—at best—limit the educational damage.

Perhaps Littleton will be a turning point, however, forcing judges and legislators to heed the opinions of parents. In contrast to elite opinion, the American public has never had much patience for civic disorder—not even in the 1950s and early 1960s, when basic civil rights were truly at stake. And today, there is remarkable agreement on the need for discipline in the schools.

A 1998 Public Agenda survey of parents found that 93 percent of blacks and 97 percent of whites think it "absolutely essential" that schools "be free from weapons, drugs, and gangs."

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Eighty-two percent of blacks, and 87 percent of whites are equally adamant about making "sure that students behave themselves in class and on the school grounds." Fully 81 percent of black, and 86 percent of white, parents believe "taking persistent troublemakers out of class so that teachers can concentrate on the kids who want to learn" is an excellent or good idea.

Blacks in the Public Agenda survey were slightly less concerned than whites about school discipline, suggesting some may worry that their children will be unfairly singled out for harsh treatment. But the overwhelming majority evidently understand that it is their kids—disproportionately concentrated in urban schools with generally low levels of academic achievement—who have the most to gain from less indulgent rules. Disorder further disadvantages those who already have the least. Education is the key to economic opportunity; if a safe environment for learning cannot be secured, deprived kids will continue to pay a stiff, lifelong price.

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Blood and altruism

JOEL SCHWARTZ

To what extent can we—and to what extent should we—rely on altruism to provide for the needy? That is the overarching question of a provocative book published in 1970 by British social scientist Richard M. Titmuss. Recently restored to print in a revised edition,[1] *The Gift Relationship: From Human Blood to Social Policy* approaches this issue through a painstaking and critical investigation of American methods of collecting blood for transfusion. Titmuss contrasted the American practice, in which recipients paid for blood, some of which was purchased from donors, with British practice, in which blood was freely given to patients and received from altruistic donors. He argued that more blood was wasted in America than in Britain, that American hospitals frequently ran short of blood, and that blood purchased from American donors was less safe and more likely to spread hepatitis among its recipients.

[1] The book was reissued in the United States in 1997 by the New Press. The revised edition includes a slightly abridged version of Titmuss's original text, as well as essays by others that discuss current developments in British health-care policy in light of Titmuss's theories. My analysis is based on the 1970 text.

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The book is a classic in the literature of muckraking and did much to alter the practices that it denounced. The American practice in which whole blood was sold, as opposed to freely donated, was abandoned not long after the book's publication.

But, as the book's subtitle suggests, Titmuss wrote his work less as a technical treatise on blood donation and transfusion than as a theoretical statement about social policy. This larger purpose aroused the interest of distinguished social scientists, including Kenneth J. Arrow, Nathan Glazer, and Robert M. Solow, each of whom devoted an extensive review essay to *The Gift Relationship*.[2] They were responding to Titmuss's warnings about the dangers of employing market mechanisms in administering social services:

> If blood is morally sanctioned as something to be bought and sold, what ultimately is the justification for not promoting individualistic private markets in other component areas of medical care, and in education, social security, welfare services, child foster care, ... and other "social service" institutions and processes?

Because Titmuss's polemic was pervaded by this larger concern, *The Gift Relationship* has rightly been described as a book about blood in the sense that *Moby Dick* is a book about whales. His larger concern is grasped by science journalist Douglas Starr (writing in his recently published *Blood: An Epic History of Medicine and Commerce*), who says that Titmuss viewed the U.S. blood system "as the symbol of everything wrong with American-style capitalism."

Titmuss's critique of markets in which blood was bought and sold reflected his wider social vision. He was a vigorous proponent of the collectivist model of providing social services and a stern critic of attempts at privatization. Titmuss articulated this vision in many of his writings and has been justly described—in the introduction to a posthumous collection of some of his essays—as "the premier philosopher and sociologist of the Welfare State."

Much has changed since Titmuss's death in 1973. His contention that the state must do more if social problems are to be solved is more controversial now than it was then. And, as I have indicated, American blood-collection practices today

[2] See Glazer's laconically titled "Blood" in *The Public Interest*, Number 24, Summer 1971.

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differ greatly from those that he described. In part, these changes derived from the emergence of new and more lethal medical risks. When Titmuss wrote, the great danger faced by those receiving transfusions was hepatitis, not HIV.

With the benefit of a generation's worth of hindsight, how well does Titmuss's analysis stand up? Are the changes in our methods of collecting blood evidence of his prescience? How plausible is Titmuss's case that altruism is preferable to economic self-interest as the basis for social policy? To answer these questions, we must examine his critique of American blood collection as practiced in 1970.

Titmuss's critique

Titmuss argued that American efforts to procure blood for transfusion were defective because they were debased by commerce:

> The commercialized blood market fails. In terms of economic efficiency it is highly wasteful of blood; shortages, chronic and acute, characterize the demand and supply position.... Finally, in terms of quality, commercial markets are much more likely to distribute contaminated blood [than is a system in which blood is freely donated and transfused]; in other words, the risks for the patient of disease and death in the form of serum hepatitis are substantially higher.

But Titmuss's evidence for some of these charges was less than ironclad. (He himself repeatedly called attention to the inadequacy of available data concerning American blood collection.)

To begin with, just how commercialized was American blood collection when he wrote? In other words, what percentage of American blood donors were impelled by economic, as opposed to altruistic, considerations? In Titmuss's view, it was a "deeply held myth ... that the voluntary donor is the [American] norm." Instead, he calculated that less than 10 percent of Americans who gave blood could truly be described as voluntary donors, whereas almost a third were paid for their donations. These figures applied to donors of whole blood. If those providing only their plasma were included,[3] the figure for paid donors rose to 47 percent.

[3] In plasma donations, also known as plasmapheresis, the liquid part of the blood (the plasma) is separated out from the red cells and other suspended elements; the suspended elements are then injected back into the donor.

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But these statistics, like all statistics, depend on the precise definition of terms. What is a "voluntary" donor? Is someone who receives a day off from work as an inducement to give blood a voluntary donor? Titmuss would have said—and explicitly did say—"no." Or suppose he is given a meal after donating? Or fruit juice and cookies (items offered to virtually all blood donors)? In each of these cases donors are offered some sort of "payment" for their service; yet most of us would probably say that these donors acted altruistically (just as someone who gives $100 to charity can be said to act altruistically, even though he can take a tax deduction if he itemizes).

Titmuss's classification of American blood donors relied heavily on definitions that can be contested. Most notably, he asserted that four-fifths of those donating blood to the American Red Cross—by Titmuss's own calculations the collector of 40 percent of all American blood donations—should not be classified as voluntary donors, even though he acknowledged that "no payment is made by the Red Cross to donors." Instead, these donors were replacing blood previously given to family members, or insuring themselves and their families against a future need for transfusions. When Titmuss's somewhat tendentious classification is taken into account, it becomes clear, Starr contends, that his critique is "unfair," criticizing "not the complex reality of America's blood resource, but a caricature." As Starr points out, a study by the National Academy of Sciences in 1971 (a year after *The Gift Relationship* was published) concluded that "only 15 percent of the American blood supply came from professional donors, while the rest could broadly be assumed to come from volunteers."

Because of the paucity of reliable data, Titmuss had little evidence to substantiate his claims that much blood was wasted in America and that American hospitals frequently ran short of blood. Yet he referred to a 1956 study showing that the proportion of American blood that was outdated and wasted—the shelf life of whole blood was only three weeks when Titmuss wrote[4]—"may well be 10 percent or more," whereas only 1 percent of blood was said to be wasted in Britain. Similarly,

[4] Whole blood now is normally separated into its component parts. Red blood cells can be stored for up to six weeks; plasma can be kept in a frozen state for a year.

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Titmuss could muster only anecdotal evidence to buttress his claim that the supply of blood often ran short in the United States, referring to "widespread reports from many areas and by numerous experts of actual and potential demand exceeding the available supply."

Because there was little hard evidence behind these claims, it is not surprising that they have been contested by other researchers, who argued that problems of waste and shortages hampered the altruistic British system no less than the more commercialized American one. For example, *The American Blood Supply*, a 1982 study by Alvin W. Drake, Stan N. Finkelstein, and Harvey M. Sapolsky, cited a 1971 survey showing that 12.9 percent of American blood was outdated before it could be used; but they noted that the 1971 British figure of 11.8 percent was quite comparable.[5]

Drake and his colleagues also cited anecdotal evidence showing that blood shortages occasionally befell British doctors—and patients—as well as their American counterparts. Another researcher noted that British physicians could request a transfusion only if blood was available, whereas Americans could call for one and expect the hospital to procure the blood. If that was the case, shortages of blood, understood as the inability to perform transfusions when requested, by definition could exist only in the United States.

A fundamental consideration, however, is that waste is, to some extent, the solution to the problem of shortages. To guarantee against shortages of blood, some waste is inevitable, as blood's shelf life is short and several blood types are rare. Thus to complain that blood is "wasted" in the effort to ward off shortages is like saying that paying your annual premium for life insurance is a waste if you are so unfortunate as not to die in that year.

Disease and stigma

Titmuss, however, had far more persuasive evidence showing that a commercialized system distributed blood that was dangerous and sometimes fatal to its recipients. By calling

[5] An earlier version of this research appeared in *The Public Interest* (Number 46, Winter 1977) in an article by Sapolsky and Finkelstein, "Blood Policy Revisited—A New Look at 'The Gift Relationship.'"

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attention to this danger, he helped to initiate an important change in America's blood-collection practices. Titmuss trumpeted evidence showing that serum hepatitis—commonly referred to today as hepatitis B—was contracted by an alarmingly high percentage—somewhere between 3 and 6 percent—of all hospital patients who received transfusions. He also pointed to a 1966 study showing that blood transfusions caused death in one out of every 150 transfusions in persons over 40 (most transfusions are given to those over 40) by infecting them with serum hepatitis. Significantly, serum hepatitis was most prevalent among the poor, in particular the denizens of skid row, who were most likely to sell their blood. In fact, studies showed that serum hepatitis was 10 times more common among skid row donors for pay than among voluntary donors (who were predominantly prosperous).

It was of great importance to Titmuss's argument that no scientific test for serum hepatitis existed when he wrote, so the only way to prevent transfusions of infected blood was not to draw it from those who were infected. Thus Titmuss could argue, quite plausibly, that altruistic donors, who were giving blood only to benefit others, would have no incentive to give infected blood; whereas commercial donors (and, by extension, commercial blood banks), who were in it only for the money, had an obvious financial incentive to give blood, even if it might harm recipients.

One possible solution to the problem publicized by Titmuss was advanced by a free-market economist named Reuben A. Kessel: Impose a liability upon commercial establishments selling infected blood, which would give profit-seeking blood banks an incentive to be more selective in their choice of donors. I will say something about Titmuss's reaction to proposals like this later. For the moment, though, I want to call attention to a notable irony in the rhetoric that Titmuss employed.

In his writings about social welfare, Titmuss argued tirelessly for the unity and indivisibility of the social community, for the responsibility of the rich to care for the poor, and against the injustice of stigmatizing the poor. In contrast, *The Gift Relationship* achieved its undeniable influence on American blood-collection policy precisely by stigmatizing the poor, calling attention to the dangers that they pose to the rest of

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the community. Who, after all, were the donors that exchanged their blood for the money of others? According to Titmuss,

> The paid donors have been variously described ... as narcotics, dope addicts, liars, degenerates, unemployed derelicts, prison narcotic users, bums, the faceless, the undernourished and unwashed, junkies, hustlers, and ooze-for-booze donors.

Writing today, Starr describes donors like these as "an underclass," whom he contrasts with the donors of an earlier era, "carefully monitored citizens," who were held to "a strict lifestyle and quasi-moral code." The word "underclass" was not in common use in 1970, but in listing the moral failings of those who sold their blood, Titmuss was calling attention to its prototype. In any event, it is noteworthy that Titmuss's characterization of the underprivileged in *The Gift Relationship* does not so much inspire compassion for the poor as revulsion at the danger that they pose.

Economic imperialism

Ultimately, Titmuss was less interested in reforming American blood-collection practices than in condemning a school of economic thinking which holds that all human behavior is, or ought to be, self-regarding and materialistic. If human blood is understood as a commodity, he contended, "the only values that would count are those that can be measured in terms of money and pursued in the dialectic of hedonism." Quite presciently, he feared that if blood could be sold for money, "then ultimately human hearts, kidneys, eyes and other organs of the body may also come to be treated as commodities to be bought and sold in the marketplace."

Titmuss was arguing against a society characterized by the imperialism of economic thinking—a society in which everything would be commercialized and understood in terms of monetary profit or loss. Such a society would be blind to the importance and beneficence of altruism, because "no money values can be attached to the presence or absence of a spirit of altruism." Titmuss feared that America's single-minded commercialism was reflected in its selfishness and its tendency to employ monetary inducements, rather than appeals to social solidarity, in the effort to procure blood. "Atomistic private

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market systems 'free' men from any sense of obligation to or for other men regardless of the consequences to others who cannot reciprocate." His charge that Americans were bleeding for pay can be viewed as an important precursor of Robert Putnam's more recent observation that we are "bowling alone."

Titmuss exaggerated the causes for concern and minimized the extent to which Americans were motivated to give blood for altruistic, rather than purely economic, reasons. Nevertheless, he was right about one thing: American proponents of markets did come to endorse the sale of human organs. Had he lived until 1978, he would have witnessed the publication of an article (coauthored by Richard Posner) advocating the legalization of markets in which babies could freely be bought and sold.

Economic imperialism is a genuine danger. Everything should not be bought and sold. Price differentials, reflecting differences in quality, are not acceptable in every domain. It is one thing to have a clothing market in which cashmere is available for the rich and polyester for the poor; it would be rather more worrisome to have a blood market in which safe blood was available for the rich and potentially lethal blood available for the poor.

Titmuss was also right to call attention to an unfortunate professional trait that characterizes many economists. Contrary to much economic literature, humans are not motivated exclusively by the desire for gain—and, from a moral standpoint, it's a good thing. By the same token, altruism is not invariably ineffective or a sham. Adam Smith did not espouse such a crude psychology. The most important and influential proponent of markets understood that people were motivated by forces other than their cupidity. "How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it, except the pleasure of seeing it."

Titmuss had reason to emphasize the dangers of crude economic thinking. One can wonder, however, about the effectiveness of altruism as a solution to social problems. Indeed, various post-1970 developments in the collection of blood illustrate the limited efficacy of altruism.

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The role of science

Because science was powerless to detect blood infected with hepatitis B when Titmuss wrote, he could argue persuasively that only altruism could mitigate the dangers of paid blood donations. With the benefit of hindsight, it is clear that it is primarily scientific progress—not the spread of altruism—that has increased the safety of the American blood supply. Writing shortly after the publication of *The Gift Relationship*, one physician predicted that we would eliminate the transmission of hepatitis B through scientific advances in our understanding of the virus—the shift to voluntary donors, desirable as it was, would not achieve this goal by itself.

That prediction has been borne out. Today, about one recipient in 12,000 contracts hepatitis B[6]—a far cry from the calamitous figure cited by Titmuss. Although the shift to voluntary donors is partially responsible for the decline, the development in 1985 of scientific tests to detect the antibody to hepatitis B deserves most of the credit.

In fairness, scientific testing can never eliminate medical risk entirely, because there is always a window between a potential donor's contraction of a disease and the appearance of the relevant antibodies in his blood. (Incidentally, medical advances are constantly reducing the size of these windows.) For this reason, not only is the blood of potential donors tested but the donors themselves must fill out questionnaires designed to detect medical risks that do not show up in the tests. These questionnaires—when filled out accurately and honestly—result in the rejection of some potential donors even when scientific tests indicate no cause for concern. In other words, we rely primarily on science to ensure the safety of our blood supply, but the honesty of donors—something Titmuss stressed—will always be an important auxiliary precaution.

Yet, in two respects, our efforts to secure safe blood demonstrate the relevance of the economists' perspective, which Titmuss tended to disdain. First, safe blood—scientifically tested blood—is necessarily more expensive. According to Starr, the

[6] Hepatitis B is now thought to be transmitted by about one out of every 66,000 screened units of blood. (A unit is roughly equivalent to a pint.) Since recipients are provided with multiple units of blood from different donors, in practice the risk translates to about one infection in 12,000 recipients.

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array of tests instituted in response to AIDS has raised the cost of a unit of blood by about $30, making its current price $150 to $200. Donors may not be paid for their blood—and recipients under socialized medicine may not pay for transfusions—but there are inexorable costs that someone must pay. To paraphrase Milton Friedman, there is no such thing as free blood.

In a sense, Titmuss wrote *The Gift Relationship* to disprove the existence of trade-offs, at least in the realm of blood collection. He argued that Britain's blood supply was not only cheaper but also safer than America's. But trade-offs are omnipresent. The most effective way of making blood safer also raises its cost.

A second trade-off is also worth noting. Starr calls attention to anecdotal evidence showing that the increasingly intrusive questionnaires now given to potential donors sometimes discourage altruistic donations. For example, questionnaires today ask male donors whether they have ever had sex with another man, "even once." One longtime donor complained that his blood center had made the donation process "so ugly and repugnant" that he stopped giving blood. In short, our efforts to make the blood supply safer may actually reduce the supply to some extent. But, as economists tell us, we must often choose between competing goods. Is it better to have a slightly smaller amount of blood that is more safe or a slightly larger amount of blood that is less safe?

The dangers of altruism

Once again with the benefit of hindsight, it is now clear that altruism, no less than commercialism, can spread disease. Hepatitis B was indeed, as Titmuss argued, a disease spread through the blood supply by indigents seeking a quick buck. But, in contemplating recent dangers affecting the blood supply, we now think of a more lethal disease—HIV. And HIV, unlike hepatitis B, was at first spread through the blood supply by comparatively affluent altruists.

Those who freely donate their blood tend to be disproportionately affluent. Titmuss demonstrated this in Britain a generation ago. In the United States today, according to the American Association of Blood Banks (AABB), "The average donor is a college-educated white male, between the ages of 30 and

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50, who is married and has an above-average income." But, as it happens, HIV contaminated much of the American blood supply because of donations by people who acted with the best and most altruistic intentions, to whom much of this profile applied. At its outset, AIDS was often a disease of the affluent: homosexuals, many of whom fit the AABB profile in almost every respect, being youthful college-educated white males with above-average incomes.

These early victims of AIDS, like everyone else then, understood neither the gravity of nor the means of propagating the disease that would soon claim so many lives. As a result, in many cases, they unknowingly transmitted HIV by donating their blood, thereby doing enormous damage to the health of many Americans. Most notably, the transfusion of blood tainted by HIV caused a majority of American hemophiliacs—more than 8,000 individuals—to contract AIDS.

Most tragically, the extensive damage resulted in no small measure from the actions of genuinely altruistic donors. As Starr observes, "well-educated and civic-minded" gays were among the most loyal donor groups, providing about 20 percent of the supply for one San Francisco blood bank. It is not surprising that blood banks were initially reluctant to discourage donations from good donors, or that they feared discriminating against homosexuals. As a result, unchecked altruism—just like unchecked commercialism—did much to propagate disease through the American blood supply.

But the dangers of unchecked altruism became clearer still in France. The French blood supply was contaminated, Starr contends, because its administrators believed that blood given freely was "inherently safe," so that testing it scientifically was unnecessary. In particular, AIDS infected the French blood supply because of administrative idealism. Prisoners, many of them carriers of HIV, were encouraged to give blood, which was thought to help in, and testify to, their rehabilitation.

In short, altruism and idealism promote public health—except when they do not. Reflecting on the AIDS epidemic, Starr reasonably concludes that altruism offers nothing like a guarantee against infected blood.

> In examining the tainted-blood tragedies of the 1980s, it becomes clear that no system was immune from mistakes, whether capital-

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ist or socialist.... Countries that emerged from the crisis with relatively low blood-borne disease rates had a few simple, common elements: diligent people in charge who fostered rapid response, open communications, and close control over the source of their supplies. Safety is a matter of practice, not ideology.

Blood commerce

Blood-collection practices today reveal a final lesson about altruism: It is not a particularly powerful force. For that reason, Titmuss's arguments have had only a limited influence. Although we now rely exclusively on altruism for donations of whole blood, there continues to be a lively market in which plasma is sold—primarily to pharmaceutical firms, which then convert it into products such as gamma globulins or antibodies that resist various diseases.

Each year, America's nonprofit blood banks collect about 14 million units of whole blood, given by volunteer donors. But that total is matched almost exactly by the figure for plasma collections, for which payments are made. There are 13 million annual plasmapheresis donations in the United States, for which each "donor" receives $15 to $20. All together, collection facilities pay plasma donors well over $200 million each year. The plasma-products industry, facilitated by these transactions, generates more than $4 billion in revenues worldwide. American firms are responsible for more than 60 percent of these sales. America exports plasma and plasma products to 90 percent of the world's nations.

If whole blood is donated in sufficient amounts by altruistic volunteers, why do we rely on monetary payments to spur donations of plasma? An illuminating answer is provided in a 1997 General Accounting Office (GAO) assessment of the nation's blood supply: "Plasma centers still pay donors because a cash incentive is deemed necessary if they are to sit through the 2-hour procedure (whole-blood donations often take less than 1 hour)."

Time really is money. Enough people may be sufficiently altruistic to sacrifice an hour of their time at the altar of humanitarianism; but once two hours is asked of them, they prefer a more tangible compensation. It is a melancholy truth that altruism simply does not run very deep in most people.

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Adam Smith's economics, fueled by the recognition that we rely not on the butcher's and the baker's "benevolence" but on "their regard to their own interest," properly begins with that premise.

And, if altruism seldom runs deep, it is also not very broad. Not many people display even the comparatively shallow altruism of those willing to spend an hour giving blood. The best evidence of this derives from Titmuss's own analysis. Although he celebrated the altruism of Britain's voluntary blood donors, he also found that only 6 percent of potential British donors—a group excluding the sick, the old, the young, and expectant and nursing mothers—actually gave blood in 1968. That figure is not notably higher than the 5 percent of potential American donors who currently donate whole blood.

In fairness, I must add that the scarcity of altruism does not invalidate the very real dangers of commercialism to which Titmuss pointed. Thus the GAO study noted that "paid donors have a higher likelihood of being infected with HIV and other diseases than volunteer donors." In 1994, for example, .016 percent of paid donors at plasma centers in California tested positive for HIV, as contrasted with only .0002 percent of donors at blood facilities that offer no payment. Again, though, a trade-off applies here: Ultimately, it is better to rely on cash payments to generate more donations of plasma, instead of relying on altruism to generate fewer. This is true even though a greater proportion of purchased plasma will be unusable; scientific tests can be relied upon to compensate for the absence of altruism by excluding almost all of the diseased blood.

In any event, it is hardly an accident that the United States openly maintains a market in plasma—and that it is also able to export its products to the countries that are too morally pure to permit such a market. As Starr explains, although the European nations enjoy having "the moral pleasure of condemning the Americans" for their crassly commercial practice of buying and selling plasma, they have had no recourse but to purchase it from America, "the OPEC of plasma." The Europeans may proclaim that it is immoral to pay blood donors; but then it is no less immoral for them to traffic in plasma, importing it from the United States, knowing that it comes from paid donors.

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Doctors know best?

Let us turn now from Titmuss's specific concern about blood collection to his broader social vision. If its humanitarianism is in many ways attractive, its inegalitarianism is not. Titmuss depicted a world marked by ineradicable dependency, in which recipients of the largesse bestowed by altruists were expected to show gratitude rather than to aspire toward self-sufficiency. This surprising endorsement of social deference from the disadvantaged is apparent, for example, in the one aspect of Titmuss's thought that is similar to contemporary conservative doctrine: He was an implacable opponent of the baneful influence of malpractice lawyers.

Titmuss blamed malpractice lawyers for unjustifiably raising the costs of medical care. Specifically, he deplored the "dramatic increases in the number and cost of malpractice and negligence suits in the whole field of medical care." Furthermore, he approvingly cited an editorial in a British medical journal lamenting the American belief that "there is cause for suit if the patient before consenting to a procedure was not informed and did not comprehend every possible disaster that could befall."

In a narrow sense, Titmuss thought this development could be blamed on ambulance chasers—plaintiffs' attorneys who worked for contingency fees approaching 50 percent of the awards received by their clients. But, in a broader sense, he explained their rise—and here he departs from conservative criticism of malpractice law—as a consequence of "the growth of commercial practices in certain sectors of medical care and the increasing application of the laws of the marketplace—of legalized and legitimated doctor-patient hostility."

The similarity between Titmuss's views and those of contemporary proponents of reforms in liability law is striking and unexpected. Ultimately, though, his argument is less plausible and far more radical than the contemporary conservative critique of malpractice law. The difference, I believe, is discernible in Titmuss's evident horror at the idea of "legalized and legitimated doctor-patient hostility." Titmuss disliked malpractice law because he wanted to think of doctors as benevolent authority figures who devoted themselves to the good of their patients. The idea that doctors could be self-interested, and that

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their performance might in some cases be improved by the self-interested recognition that their negligence was legally actionable, made him uncomfortable. He preferred to understand the doctor-patient relationship as a harmonious union between well-meaning altruists and their grateful beneficiaries.[7]

To their credit, conservatives tend to be less romantic than Titmuss, and more comfortable with the reality and the defensibility of self-interest. They also tend to be more comfortable with systems of checks and balances, in which it is not just humanitarianism but also self-interest (as in a doctor's prudential recognition that his incompetence may cause him to lose patients, if not lawsuits) that spurs good performance. In other words, most conservatives today criticize the application of malpractice law—in which many frivolous lawsuits against doctors are filed and then won—and not the principle underlying it. By contrast, even the principle seemed unwarranted to Titmuss, who found fault with a society marked by sometimes antagonistic self-interest, judging it by the standard of a utopian vision of harmony and benevolence.

In practice, it is worth noting, some measure of authoritarianism would necessarily characterize Titmuss's utopia. It would be a world where doctors know best, in which it would be unseemly of patients to question their judgment. It would not be a particularly egalitarian world, if one considers the advantages in status and income that doctors generally have over patients. The prominent economist Robert M. Solow called attention to this unattractive aspect of Titmuss's thought many years ago in his review of *The Gift Relationship*. As Solow nicely put it, Titmuss "seems to believe that ordinary people ought to be happy to have many decisions made for them by professional experts who will, fortunately, often turn out to be moderately well-born Englishmen."

Better to give than to receive

Titmuss's larger argument in behalf of the welfare state was also weakened by the tendency, to which I have pointed, to magnify the importance of altruism and belittle the legitimacy

[7] For this reason Reuben Kessel's proposal to increase the safety of America's blood supply by imposing liability on the purveyors of diseased blood did not appeal to Titmuss; he wished to improve matters not by appealing to self-interest but by transcending it.

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of self-interest. Consider his argument that "the historical emergence of social welfare institutions in the West" could be understood—just like the voluntary and uncompensated provision of blood for transfusion—as a manifestation of "altruism by strangers for strangers." But the analogy between the transfusion of blood given to patients and the infusion of cash given the indigent is faulty in two respects. First, the voluntary donation of blood is genuinely altruistic because it is not compulsory; no one is forced to give blood. By contrast, the welfare state is financed by tax payments that are compulsory. Titmuss himself noted that the welfare state "has ... to be formally organized, to be administered by strangers, and to be paid for collectively by strangers"—"has to be," of course, is the language of compulsion, not the language of voluntary donation. We simply do not manifest altruism by paying our taxes.

The more important distinction, though, centers not on the donors but the recipients. It would be absurd to expect the injured and diseased to achieve self-sufficiency in blood, to demand that they themselves supply the blood that they need, when they need it. By contrast, it is much more plausible to suggest that in many, if not all, cases the poor can, and properly should, aspire to economic self-sufficiency. The goal of the poor should be—and often is—to achieve self-reliance. It should not be—and seldom is—to accept with gratitude the long-term assistance offered by the benevolent. On moral grounds, the self-reliance of the poor is preferable to their reliance on the altruism of others.

Unfortunately, Titmuss was largely unconcerned about the aspirations of the poor to self-reliance. He had much to say about the nobility of giving, but nothing whatsoever to say about the indignity of continual receiving. Thus, for all his praise of altruism, he never seriously considered the wisdom of the adage that "it is better to give than to receive." Giving is generally a good thing, but past a certain point, receiving from others what we could provide for ourselves is genuinely bad.

Titmuss was silent about the evils of long-term dependency because he did not believe that the poor could reasonably aspire to self-sufficiency. Thus he contended that the American "victims of technological displacement ... [we]re *permanently* out of work; permanently liberated from work"—a view

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that does not seem plausible today (and was probably not plausible when Titmuss stated it in 1965). Nevertheless, believing that the poor were unemployable, he called for a "major shift in values," to be marked by a rejection of the belief in hard work as a virtue.

Skeptical as he was of the capacity of the poor to attain self-sufficiency, Titmuss was oblivious to—if not disdainful of—the prudential virtues of self-reliance that often enable the disadvantaged to dispense with the aid of prosperous altruists. Thus Titmuss criticized a British pension law of 1908 on the grounds that it withheld pensions from those "who had habitually failed to work according to ability and need and [from] those who had failed to save money regularly." That attempt to promote the diligence and thrift of the poor—not to attack them but to assist them—was incomprehensible to him. Similarly, he had contempt for those who sought to encourage the poor to improve their condition by manifesting the prudential virtues. Their attempt to lead the poor "through sanitation, soap and thrift to a better station in life" was simply a manifestation of "the spiritual squalor of the lower-middle classes."

While it is well and good to encourage altruism, there is also a case to be made for encouraging the virtues that can help its beneficiaries do without it. Titmuss made too much of the virtue of altruism, because he consistently depreciated the rival virtue of self-reliance. However, Titmuss's critique of the imperialism of economic thinking continues to teach us. He was right to realize that there are important costs that cannot be calculated by cost-benefit analyses. But, at the same time, altruism brings with it problems of its own. Establishing altruism as the principal social virtue would require us to pay costs—moral as well as economic—that are, and should be, unacceptable.

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Boston cops and black churches

CHRISTOPHER WINSHIP & JENNY BERRIEN

IN recent years, homicide rates in a number of large American cities have plummeted. Between 1990 and 1996, New York's rate dropped 58.7 percent, Houston's 54 percent, Los Angeles' 27.9 percent, Philadelphia's 17.7 percent, and Washington, D.C.'s 15.9 percent. In most, if not all of these cities, the precipitous decline in homicide rates derives from even sharper declines in youth violence. However, not all cities have been so fortunate. For example, in Baltimore, Phoenix, and Las Vegas, homicide rates have risen by 7.5 percent, 45.3 percent, and 103.8 percent respectively. A key question then is: Why has youth violence fallen so significantly in some cities but not in others?

Certainly, part of the decline in youth violence can be attributed to the robust economy, as well as to the nationwide

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decline in the number of youths aged 15 to 24, the most crime-prone age group. But these factors are present in almost all cities, and thus cannot explain the differences across the nation. Besides, similar declines in homicide rates did not occur in the mid and late 1980s when the economy was also strong. And the 7.7 percent drop in the number of youths aged 15 to 24, from 1986 to 1996, is too small to account for much of the improvement.

The dynamics of youth violence are complex, depending upon a myriad of factors that vary from city to city. But certain features of violence reduction in Boston stand out, yielding important answers as well as lessons for other cities. The drop in homicide rates in Boston has been the steepest in the nation. Between 1990 and 1996, Boston's rates dropped 61.2 percent, from 152 homicides to 59. In 1997, the rate dropped further to only 43 homicides, a total decline of 72 percent from the previous high. By 1998, only 35 murders took place. Perhaps even more stunning is that, for the 29-month period ending in January 1998, Boston had no teenage homicide victims. Since that time (as of this writing) there have been four.

Boston is also unusual in that a group of ministers, the Ten-Point Coalition, is thought to have played a key role in reducing youth homicides. The media has already lavished attention on the coalition's work. *Newsweek* ran a feature story; *Time*, *Sojourners*, the *Weekly Standard*, the *New York Times*, the *Boston Globe*, and the *Atlanta Journal Constitution* have all run major stories on the ministers. PBS made the Ten-Point Coalition the subject of a documentary.

What we will explore is whether the coalition has, in fact, played a significant role in reducing youth violence in Boston. At first glance, the answer appears to be no. Crime rates have ropped dramatically in other cities without significant involvement from the clergy. The fact that only three ministers—Eugene Rivers, Raymond Hammond, and Jeffrey Brown—have been centrally involved, and that even they have not devoted themselves to the coalition full time, suggests that too little has been attempted by the churches for them to have played a substantial role in the crime reductions. And David Kennedy, a researcher at Harvard's Kennedy School of

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Government, has documented how new law enforcement policies and practices have led to more effective ways of dealing with youth violence. The assertion that the Ten-Point Coalition has been a significant player would seem to be, at best, good public relations.

We will argue, to the contrary, that the Ten-Point Coalition has played a critical role in Boston's sharp drop in youth violence. It has done so by changing the way the police (and other elements of the criminal justice system) and Boston's inner-city community relate to each other. In its intermediary role between the two parties, the Ten-Point Coalition balances the community's desire for safe streets and its reluctance to see its children put in jail. It has created what we will call an "umbrella of legitimacy" for fair and just policing.

The Boston story

Boston has never been considered a violence-plagued city on the scale of Los Angeles or New York. But in 1990, 152 homicides occurred in Boston—a record high. The roots of this violence took hold in the late 1980s, when crack-cocaine found its way into Boston's inner city. As the crack market developed, so did turf-based gangs and gang violence. To protect their financial stakes in the booming crack-cocaine market, as well as to maintain "respect," the gangs increasingly turned to firearms. "Disrespect" was punished by violence. And a vicious cycle developed, in which individuals joined one gang to protect themselves from another gang. With firearms serving as the primary method of protection and retaliation, as well as being tools for spontaneous assaults, the frequency and severity of violence grew to a level never before seen in the Boston area.

Since Boston law-enforcement agencies had not previously dealt with turf-based violence and criminal gang activity, their initial response was inadequate. Up until 1990, the department denied that there was a "gang problem." Many current Boston police officers have vouched that the department simply had no policy for combating gang violence. Without an in-depth understanding of the problem or a plan of attack, police officers fell back on the aggressive, riot-oriented tactics of the 1960s. In addition, because homicide has traditionally been handled on a case-by-case basis, the police department aimed

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at making the "big hit" and arresting the "big player," rather than addressing the group-based nature of gang violence.

In 1988, the City Wide Anti-Crime Unit (CWACU), traditionally responsible for providing support across district boundaries, was permanently assigned to the most violent neighborhoods of Boston's inner city. In 1989, the police department declared that any individual involved in a gang would be prosecuted to the full extent of the law. Finally, the department had acknowledged the existence of a "gang problem."

But to what effect is another matter. According to one current police captain, the CWACU was expected to "go in, kick butts, and crack heads." A common attitude emerged within the force. They believed that "they could do anything to these kids" in order to snuff out their violent activity. This mentality produced, not surprisingly, highly aggressive and reportedly indiscriminate policing tactics.

Community backlash

Two scandals in 1989—the Carol Stuart murder investigation and the department's "stop-and-frisk" policy—alerted the community to the police's questionable tactics. Carol Stuart was a pregnant white woman who was murdered in the primarily African-American neighborhood of Mission Hill. Her husband, Charles Stuart, who was with her at the time of her death, claimed that a black male had murdered her. As a result of the accusation, the Boston Police Department scoured the Mission Hill neighborhood, looking for suspects. The community reported instances of police abuse as well as coerced statements that were later used as evidence against a black male suspect, William Bennett. But Charles Stuart himself was later identified as the alleged perpetrator of the crime, though he committed suicide before an investigation could be completed. The mishandling of the Stuart murder investigation and the dishonesty of the victim's husband created an atmosphere, especially within the African-American community, of extreme distrust of, and disillusionment with, the Boston Police Department.

The stop-and-frisk scandal intensified these sentiments. A precinct commander's description of the department's approach to prevent gun-related violence as a policy of "stop and frisk,"

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en masse, outraged the black community and solidified the Boston public's suspicion of the police. There is some dissension within the police department about the extent to which their policy was really to stop and frisk all black males, indiscriminately, within high-crime areas—a policy also referred to as "tipping kids upside down." According to some officers, targeted individuals were either previously spotted performing some illegal activity or were known gang members. But officers also acknowledged that their approach was critically flawed in that it was often very difficult to "distinguish the good guys from the bad guys." In addition, some officers admitted that there were "bad-seed" cops who acted far too aggressively in certain cases. Accusations of "stop-and-frisk" tactics led to a court case in the fall of 1989 in which a judge threw out evidence acquired in what he considered an unconstitutional search and seizure.

Because of the bad press surrounding the Stuart case and the stop-and-frisk scandal, the CWACU was disbanded in 1990. However, it must be noted that the police department's aggressive street tactics seemed to work: Boston's homicide rates fell from 152 in 1990, to 103 in 1991, to 73 in 1992. But regardless of this success, most officers acknowledged that the department's aggressive searches dangerously inflamed the community.

The Boston press began to question the police department's ability to manage even routine policing activity. In 1991, the *Boston Globe* published a harshly critical four-part series, "Bungling the Basics," that detailed a succession of police foul-ups during the previous few years. A subsequent group of *Globe* stories reported serious failings in the department's Internal Affairs Division. The misguided investigations and questionable policing exposed by the press eventually led to the appointment of the St. Clair Commission, which was assigned the task of thoroughly reviewing Boston's police department and its policies.

At this point, the Boston Police Department began a desperately needed overhaul to deal with the negative publicity. "Bad-seed" cops were weeded out. The old and disbanded CWACU was transformed into a new unit, the Anti Gang Violence Unit (AGVU), which espoused a "softer" approach to violence prevention. The aggressive and indiscriminate—though

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admittedly effective—street tactics of the past were sharply curtailed. As a result, the short-term drops in homicides during 1991 and 1992 were followed by a sharp upswing in the homicide rate to 98 in 1993.[1]

The release of the St. Clair Commission's report in 1992 spurred further administrative changes at the highest level. The report cited extensive corruption within the department and recommended major changes. In 1993, Mayor Flynn resigned, and Police Commissioner Mickey Roach was replaced by the New York Police Department's Bill Bratton, who brought a new philosophy and a spirit of innovation to the Boston Police Department.

New police methods

According to current Boston police officers, community policing tactics, which formerly "just existed on paper," were actively pursued under Commissioner Bratton. Many officers reported that the new administration was more open-minded, more willing to break away from traditional policing practices.

The newly organized Anti Gang Violence Unit looked for improved methods to manage gang violence. They targeted the areas where they had failed during the past few years. They were determined to employ "squeaky-clean" policing strategies in order to win back the community's trust. The AGVU also pursued an increasingly multi-agency approach to combat youth violence. Then, in 1993, the AGVU underwent an administrative change, becoming the Youth Violence Strike Force.

Other agencies within Boston's law-enforcement network were also being revamped. Workers in the probation department became disillusioned by the "paper-shuffling" nature of their jobs. Because of the dangerous levels of violence within certain Boston districts, probation officers had given up maintaining a street presence or making home visits. Consequently, the enforcement of curfew, area, and activity restrictions was entirely absent. Lacking enforcement, probation came to be

[1] The question of causality and timing here is complex. The most aggressive period of stop-and-frisk tactics ended in 1990. Yet the homicide rate continued to fall in 1991 and 1992. If one believes that the causal connection is contemporaneous, then this is evidence of a lack of a causal effect. However, if the causal effect of police enforcement lags, then this is evidence of a causal effect.

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viewed by law-enforcement officials as a "slap on the wrist" that had little effect in the battle against youth violence.

A strategy called "Operation Nightlight" was developed to make probation meaningful and effective. It began when three probation officers and two police officers ventured out in a patrol car on the night of November 12, 1992. During this first night, they made contact with several youths who were violating the terms of their probation. Youths suddenly became aware that they could no longer blatantly disregard the terms of their probation because their PO might show up at their house after curfew. Subsequently, Operation Nightlight became an institutionalized practice of Boston's law-enforcement agencies.

Inter-agency collaboration to address the issue of youth violence has now become standard procedure in Boston. The Boston Gun Project, a three-year program begun in 1995, brought together a broad interagency group, including the Police Department, Bureau of Alcohol, Tobacco, and Firearms, Probation Department, Boston school police, and Suffolk County District Attorney. Policy researchers (primarily David Kennedy and his associates at the John F. Kennedy School of Government) and key community members also played vital roles. The Gun Project coalition has attacked the problem both on the supply side, by cracking down on suppliers of illicit firearms, and on the demand side, by identifying high-risk individuals. These individuals, 1,300 in all, representing less than 1 percent of their age group city-wide, were responsible for at least 60 percent of the city's homicides.

In 1994, another program to reduce gun violence, "Operation Scrap Iron," was initiated. It attempted to identify smugglers who were illegally transporting firearms into Boston. Gun trafficking within certain sections of the city was completely shut down by using such methods as "area warrant sweeps" in dangerous neighborhoods. In one housing project, the police arrested everyone with outstanding warrants in the area. Follow-up teams of street and youth workers offered their services to these areas once the police were gone. As one police officer noted, these strategies made sure that, "everyone was involved and brought something to the table."

By mid May 1996, the culmination of this collaborative work

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emerged with the implementation of Operation Cease-Fire. Operation Cease-Fire fully institutionalized inter-agency collaboration among Boston's crime-fighting agencies: Police, Probation, Department of Youth Services, Street Workers, and others. In addition, it involved key community members, primarily from faith-based organizations in the Boston area.

Birth of the Ten-Point Coalition

Members of Boston's religious community were among the most vocal and publicized critics of the earlier aggressive tactics of the police department. Reverend Eugene Rivers, in particular, became a controversial figure during these years because of his harsh criticism of Boston's law-enforcement agencies as well as the city's black leaders. It is therefore quite remarkable that these religious leaders were later active participants in such law-enforcement initiatives as Operation Cease-Fire.

Boston's religious organizations did not begin working together until 1992. Until that point, most African-American clergy within Boston followed their independent agendas. Faith-based activity did not, for the most part, address the crisis of youth violence. Rivers did establish outreach programs for gang members and other community youth, but his differences with other clergymen made his effort a lone endeavor. A single tragic event finally instigated collaboration among Boston's African-American clergy. In May 1992, the Morning Star Baptist Church held a service for a youth murdered in a "drive-by" gang shooting. During the service, a shootout and stabbing occurred among several of the gang members. A melee ensued within the sanctuary.

The brazenness of the attack—within the walls of a church—captured the attention of the clergy, inciting them to action. They perceived that they could no longer effectively serve their communities by focusing solely on their own congregations. The community, with its troubled youths, had to become an extension of the church. Thus was the Ten-Point Coalition born, including some 40 churches, with Reverends Rivers, Hammond, and Brown as the key leaders. A "Ten-Point Proposal for Citywide Mobilization to Combat the Material and Spiritual Sources of Black-on-Black Violence," written by Rivers and a former drug

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dealer, Selvin Brown, was issued, calling upon churches to address the crisis of violence in their communities.

The creation of the Ten-Point Coalition marked the official beginning of Boston's African-American religious community's organized involvement in the youth-violence epidemic. As of 1992, relations between African-American community leaders and Boston's law-enforcement agencies were still strained. Rivers was constantly "in the face" of Boston law enforcement and viewed as a "cop basher" in police circles. He established a constant presence in the troubled neighborhoods of Dorchester and was in contact with the same kids as the Anti Gang Violence Unit. Rivers' aggressive advocacy for local youth, in and out of the courts, led to many confrontations with the AGVU. But this initial antagonism was eventually replaced by cooperation. A number of events, along with the new, improved policing approach, spurred the turnaround.

In 1991, Rivers' house in Four Comers, one of the most violent areas of Dorchester, was shot at for the first of two times. Though he and his family were not harmed, the incident reminded him, in the most literal sense, of the dangers of a solitary campaign against youth violence. Rivers increasingly sought allies in the religious community and in law-enforcement agencies.

The Ten-Point Coalition, and especially Rivers, had habitually and severely criticized the Boston Police Department. Now they sought to engage in constructive cooperation. In 1992, the coalition set up a "Police Practices Coalition" that monitored policing in the Boston area. Positive interactions with law enforcement increased, convincing the clergy that the department was indeed interested in reform. To acknowledge the department's progress, the ministers instituted a ceremony called the "Police Youth Leadership Awards," which would honor "good cops." These improved interactions between the African-American clergy and law enforcement were followed by other initiatives, and their relations have continued to evolve and expand in recent years.

The McLaughlin murder

Today, inter-agency and community-based collaboration is the rule in Boston, and there is considerable trust between

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the police and the community. This progress was tested with the investigation of the McLaughlin murder. On September 25, 1995, a white assistant attorney general, Paul R. McLaughlin, was shot and killed on his way home from work at the commuter rail station in West Roxbury, a middle-class, predominantly Irish neighborhood in Boston. A well-respected prosecutor, McLaughlin had recently been working on a task force against gang members. His murder appeared to be a "hit" in retaliation for this work.

When the police department issued its description of the assailant—"black male, about 14 or 15 years old, 5 foot 7, wearing a hooded sweat shirt and baggy jeans"—there was instant concern among African Americans that such a vague profile could easily apply to many young black males. But immediate and reassuring responses from law-enforcement officials and community leaders helped to abate the potentially divisive nature of the vague description. The law-enforcement community had its own objective: Many suspected that McLaughlin was targeted mainly because he had prosecuted many gang members and wondered whether they were also in danger. The law-enforcement community therefore made it a priority to respond to the murder quickly and decisively.

So did leaders in Boston's African-American community. The executive committee of the Ten-Point Coalition publicly condemned the murder at a press conference the following day. Rivers cited the press conference as critical in preventing what he described as an "open season on black youth"—which he believed did occur during the Carol Stuart murder case. In the press conference, the clergy expressed sympathy for the McLaughlin family and placed a strong emphasis on bringing the city together to avoid the threat of severe polarization by advocating an aggressive, but fair, investigation of the murder.

This immediate and firm stance sent several important messages. First, the ministers emphasized that even a community characterized by historically antagonistic feelings toward the police would not tolerate the vengeful murder of a law-enforcement official. Thus the African-American youth in the community were told that the murder must not be interpreted as a kind of justifiable self-defense. And, by pledging their support for a fair police effort, the ministers emphasized that

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police aggression or harassment was unnecessary and would not be tolerated. In addition, the ministers' statement defanged the media. By taking a stand in support of police action, and by exhibiting trust in the department's approach, the black clergy made it less likely that the media would exaggerate or aggravate a tense situation. Finally, the coalition's stance indicated that, as a police source put it, the "clergy viewed them (the police) as a much different police force" by the time of the McLaughlin murder and were confident that the department would carry out a "professional investigation."

The improved police tactics were displayed during this particularly sensitive period. Commissioner Paul F. Evans spoke on a radio station with a large black audience soon after the murder to emphasize the limited value of the vague assailant description and to assert that an effective investigation depended on cooperation between the police and the community. The commissioner also joined the ministers at the Ten-Point Coalition's press conference to highlight police cooperation with the African-American community. Both the law-enforcement community's and black clergy's approach toward the McLaughlin murder illustrated the dramatic shift that had occurred in the relationship between these two groups since the late eighties and early nineties. (A convicted murderer, Jeffrey Buy, was indicted for the McLaughlin murder and is currently standing trial.)

Blacks and the judicial system

Something very unusual has happened in Boston: The black community and law enforcement are no longer at odds with one another. A moment's reflection on the general state of relations between African Americans and the judicial system will confirm just how unique such trust is. Many black communities in America's largest cities believe themselves to be at war with the local police. The metaphor of the police as an occupying military power is frequently invoked. The reasons for this perception are perfectly well known. The shooting in New York this past February of Amadou Diallo, an unarmed African street vendor, has again brought national attention to this problem.

Inner-city residents are often unwilling to support police

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activities, even though they are, to an overwhelming degree, disproportionately the victims of crime—and the crimes are frequently committed by their fellow residents. In his book, *Race, Crime, and the Law*, Randall Kennedy describes the growing alienation of black inner-city residents from the criminal justice system. He locates the origins of their resentment in the South and in the historical lynchings of blacks, offering as evidence, the following quotation from Gunnar Myrdal's 1944 book, *An American Dilemma*:

> The Negroes ... are hurt in their trust that the law is impartial, that the court and the police are their protection, and indeed, that they belong to an orderly society which has set up this machinery for common security and welfare. They will not feel confidence in, and loyalty toward a legal order which is entirely out of their control and which they see to be inequitable and merely part of the system of caste oppression. Solidarity then develops easily in the Negro group, a solidarity against the law and the police. The arrested Negro often acquires the prestige of a victim, a martyr, or a hero, even when he is simply a criminal.

Kennedy describes how this same dynamic is at work today:

> It largely explains why many blacks rallied around the gang of boys who raped a white jogger in New York's Central Park, around Marion Barry, the mayor of Washington, D.C., who was caught red-handed smoking cocaine, around Alcee Hastings, the federal district court judge who, based on allegations of corruption, was ousted from office by the U.S. Senate (only to be subsequently elected to the House of Representatives), around Damian Williams and the other hooligans who gained notoriety when they were filmed beating a hapless white truck driver (Reginald Denny) in the early hours of the Los Angeles riot of 1992, and around Mike Tyson, the boxing champion, when he was imprisoned for rape.

The point is that excesses of the judicial system, both historical and present, have led inner-city minorities to view our criminal justice system as totally lacking in legitimacy. The result: Criminals are often seen as political dissidents and martyrs.

If Randall Kennedy's portrayal of inner-city minority residents' attitudes toward the criminal justice system is even somewhat accurate, it is hardly surprising that police have found it nearly impossible to deal with youth violence in our inner cities. When police are unlikely to receive cooperation

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from residents, the only option has been aggressive tactics that only further alienate community residents.

But why is the relationship between police and inner-city residents in such a chronically sorry state? Inner-city residents often have conflicting goals. On the one hand, they desire, as do all Americans, safe streets and neighborhoods. On the other hand, they do not want to see their children locked up. As Glenn Loury has noted, "The young black men wreaking havoc in the ghetto are still 'our youngsters' in the eyes of many of the decent poor and working class black people who are often their victims." Given these conflicting desires, how are decisions to be made about whether a particular youth should be arrested or jailed? When should a youth be given another chance? What are the costs to the community versus the benefits to the youth of his not going to jail? When a youth gets into trouble, a terrible and difficult decision must be made. The youth may be allowed to remain in the community, potentially endangering its residents. Or the youth may be sent to jail, depriving him of his freedom and perhaps his future. Neither option is attractive to black parents.

But one thing remains clear: Most inner cities simply do not have institutions that can deal with this problem in a way perceived as just, both by the local community and the broader society. The police are too biased in favor of safer streets; social workers, street workers, and community organizers are too sympathetic to the kids. Community residents themselves frequently base their judgments upon who is in trouble and what the individual's relationship to them is. How is a decision to be made that is fair and just?

The umbrella of legitimacy

In Boston, the ministers of the Ten-Point Coalition participate in making decisions that are perceived to be fair and just. Through their involvement with at-risk youth and their intervention in situations where youth are in trouble with the law, they have projected a sense of fairness. Consequently, they have created an "umbrella of legitimacy" for law enforcement. This "umbrella" enables the police to do their job in a way that is in the best interests of the larger community and youth without an inordinate fear of public criticism.

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If one were in search of legitimacy, there could perhaps be no better conferees than religious ministers. Ministers have a unique moral standing in society. They are expected to be fair and to protect the interests of the less fortunate. Amid the inner city, they and their churches are one of the last formal institutions committed to the welfare of their neighborhoods. Within the black community, especially, they are often looked to for leadership. In the case of Ten-Point, two of the three core ministers live in Boston's inner city; all three are well known for their extensive work with inner-city youth. These factors have lent Ten-Point considerable credibility in Boston's inner-city community.

The unique relationship between the police and Ten-Point is built on a number of implicit understandings, each of which potentially supports the legitimacy of the police: that youth violence needs to be dealt with as a criminal problem; that some kids need to be jailed both for their own good and the good of the community; that a small number of youths constitute this problem and that the ministers will help identify those youths; that the ministers will have a say in what happens to specific youths; that if police use indiscriminate and abusive methods in dealing with youths, the ministers will take the story to the media.

The first assumption is that, at least over the short run, youth violence must be treated as criminal. Yes, such factors as poverty, single-parent households, and inadequate schools contribute to youth violence. But the immediate problem will never be solved if law enforcement plays no role. Thus ministers have made it clear to at-risk kids that they have two choices. If they go straight, the ministers will help them to succeed in school, find jobs, and resist the peer pressure exerted by gangs. However, if they decide to participate in gang activities, the ministers will do their utmost to see them put in jail. The ministers make it clear that they are doing this both for the community's and the kid's own good. They are doing it for the community because the kid is a threat to its safety. They are doing it for the kid to save his future, even his life. If a kid is going to be involved in a gang, it is better that he be in jail than on the street.

Implicit in this "choice" is a second assumption—that some

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kids are sufficiently out of control that the only option is for them to be put away. It is not apparent that the ministers thought this in the beginning. Certainly, the police did not initially believe that the ministers would support the incarceration of certain individuals. Interviews with both police and ministers indicate that cooperation became possible at a single critical point—with the public acknowledgment by the ministers, most vocally by Rivers, that some kids were simply so out of control that they needed to be locked away. This did not mean that the police and ministers agreed on *which* kids needed to be put behind bars. But both parties now had the same definition of the problem, disagreeing occasionally on what should be done in particular circumstances.

A third assumption has been the understanding by both police and ministers that only a small number of youths cause most of the problems. Kennedy has estimated that this number is only 1 percent of the entire age group—1,300 youths. As Rivers has said, it only takes a few kids shooting off guns to terrorize a whole neighborhood. This is why standard stop-and-frisk procedures can be so oppressive. For the dozens of kids stopped, only one is truly part of the problem. An essential part of the informal agreement between Ten Point and the police has been that the ministers will help identify those kids who are the real problems. That is, they serve the police in a remote surveillance capacity. This not only makes police efforts more effective but increases their legitimacy by ensuring that they focus on malefactors only.

A fourth and related assumption is that the ministers have a nonofficial role in determining how different individuals should be treated by the judicial system. In some circumstances, this has meant that the ministers have contacted the police to request that certain kids be arrested. In such cases, the ministers will sometimes help police locate the kids. In other cases, it has meant that the ministers have appeared in court to argue either for leniency or for a stiff sentence.

Thus the umbrella of legitimacy allows the police to function more comfortably. The ministers enable the police to deal with the problem of youth violence without recrimination from the press or the community. The umbrella only provides coverage for specific activities, however, bringing us to the

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final assumption. When police focus on the truly bad youths, when they deal with these youths in a fair and just way, and when all this is done in cooperation with the ministers, their activities fall under the umbrella. Activities outside these boundaries fall outside the umbrella and will not be tolerated.

Our analysis suggests that Ten Point has become an intermediary institution between the police and the community. Black leaders now have some control over the judicial process and some say over who should be jailed and who let free. Ten Point helps adjudicate between the sometimes conflicting goals of having safe streets and keeping kids out of prison. Critically, because of the Ten-Point Coalition's involvement, the different treatment of different youths is more likely to be seen by the community as legitimate. Hard decisions are being made, but in a way that is seen as fair and just.

Cooperation is key

The police cannot be effective if their activities are not perceived as legitimate by the community. Communities want both safe streets and their youth out of jail. Choices need to be made—choices that are likely to be considered unjust by some subset of residents. In this environment, police action, no matter how beneficial, is often condemned as illegitimate.

The Ten-Point Coalition has evolved into an institution that addresses this situation. They have created what we have called an umbrella of legitimacy for police to work under. Freed of knee-jerk suspicion and benefiting from community cooperation, the police can concentrate on truly violent youth, rather than indiscriminately monitoring the innocent with the guilty. We believe that this new dynamic, which is unique among most major cities, has contributed to the spectacular drop in homicide rates in Boston.

The lesson of the Boston experience is this: In the struggle against crime, police cannot go it alone; they need the cooperation of community leaders. Such partnerships help reduce youth violence and, equally important, delineate what constitutes legitimate police behavior. Police strategies can only acquire true legitimacy within inner-city communities if the community supports appropriate police tactics while harshly criticizing inappropriate tactics. In these circumstances, churches

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and ministers are ideal partners. And, at the very least, the possibility that Boston has found an effective strategy for reducing youth violence, without severely and broadly compromising the civil liberties of its inner-city residents, is very exciting.

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Prevention through community prosecution

CATHERINE M. COLES & GEORGE L. KELLING

THE single greatest influence on postwar American criminal justice policy was President Johnson's Commission on Law Enforcement and Administration of Justice, whose main report, *The Challenge of Crime in a Free Society* (1967), was hailed by liberals and criminologists as a great breakthrough. Its conclusions quickly became the conventional wisdom, laying the foundation for criminal justice policy throughout the 1970s, 1980s, and into the 1990s.

The commission made two recommendations that were especially important at the time. First, it insisted that police firmly adhere to lawful procedures when handling offenders. Indeed, the Supreme Court, aware of the brutal investigating tactics that police chiefs either could not or would not rein in,

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had already handed down rulings describing how a lawful investigation would be conducted. Second, the commission urged the nation's criminal justice agencies, especially police departments, to improve their relations with minority communities. If the police did not directly cause every riot in the 1960s, as their most hostile critics alleged, their insensitivity toward minorities certainly triggered many.

But, for all its key contributions, many of the commission's other findings and conclusions are being challenged, and even abandoned, today. Its attempt to "professionalize" criminal justice is, in particular, under assault. According to the commission, the amalgam of police, prosecutors, jails, prisons, probation, parole, and courts comprised a "criminal justice system"—the "business" of which was to process cases. Only felonies like murder, rape, assault, and robbery were recognized as serious, while comparatively minor offenses, like public drunkenness and other "victimless" crimes, would essentially be decriminalized. Moreover, responses to crime were to be handled only by highly trained "professionals." Citizens would report crimes and act as witnesses. Crime prevention, to the extent that it occurred in this "system," would be achieved through incarceration and deterrence.

Underpinning this notion of a criminal justice "system" was a "root-causes" understanding of crime. The commission argued that the root causes of crime were racism, poverty, and social injustice—implying that crime prevention would require the elimination or amelioration of these conditions through radical social change.

In fact, the policies derived from root causes ideology and the narrowly defined functioning of criminal justice agencies have hindered crime prevention and innovative thinking about crime control for decades. According to liberals, crime can be prevented only by massive social changes that address crime's root causes. Conservatives have their own theory of root causes: To prevent crime, the decline of families and corrosion of traditional values must be reversed. Until recently, little was expected of criminal justice agencies except to respond to crime and process the ensuing cases.

The most highly publicized rejection of this old paradigm, and the most prominent battleground for its survival or demise, is in New York City, where, under Mayor Giuliani and

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Commissioners Bratton and Safir, an array of aggressive, new police tactics, along with numerous public and private initiatives, led to an unprecedented reduction in crime. But New York City's success has engendered both welcome support and outright hostility. Critics in the popular media concede that the police department's new strategies have helped reduce crime but charge that lower crime rates have come at an unacceptable cost to civil liberties, especially those of poor and minority residents. Skeptical criminologists deny any linkage between police tactics and the drop in crime, attributing the reduction instead to changes in economic, demographic, or drug-use patterns. The root-causes philosophy drives many of these denials—for how could crime rates drop except through economic or social change?

The debate continues. But New York City is not alone in adopting and implementing new crime-prevention strategies—cities like San Diego and Boston have been just as successful. And more than just police departments are participating in the reforms. Prosecutors are changing their practices as well, joined in a growing number of cities by probation and parole officers, the courts, and even wardens.

Turning a corner

In policing, the President's Commission largely endorsed the early twentieth-century Progressive agenda. Yet, even as reform was being implemented—improved recruitment, training, and administration, and tighter control to reduce corruption—the seeds of its demise were being sown. Despite police claims that adequate numbers of professional police could reduce crime, the opposite occurred: Beginning in the 1960s, crime began to rise.

In 1975, eight years after the commission released its report, the Kansas City Preventive Patrol Experiment was published. The study concluded that the impact of police patrolling in cars on crime, and citizen fear of crime, was negligible. Then in 1977, the first of several "response-time" studies appeared, showing similarly that rapid response to calls enhanced neither police effectiveness nor citizen satisfaction with the police. By the late 1980s, incident-based reactive policing—taking police off streets and placing them in cars so

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that they could engage in preventive patrol and rapid response to calls—had "de-policed" most major cities. Gangs and drug dealers controlled many public spaces. As Ed Davis, Chief of the Lowell (MA) Police Department, has said: "The trouble is we were all doing our jobs well: police, prosecutors, courts, and corrections. We were making good arrests; prosecutors were handling cases well, and so on. Yet, despite this, things were getting worse and worse on the streets."

In retrospect, early clues about the shape of policing's future were present by the late 1970s and early 1980s. Team policing—a 1970s community-based approach—passed preliminary evaluations and became popular with the citizens and officers who practiced it, though somehow it never prevailed. Foot patrol, despite being viewed as a dumping ground for incompetent officers by most police executives from the 1940s on, remained popular with citizens and politicians, and research suggested that it reduced fear. In a 1979 article, University of Wisconsin professor Herman Goldstein proposed an alternative philosophy of policing that received immediate attention: Police would be problem solvers rather than "incident reactors." James Q. Wilson and George Kelling, in 1982, advanced the "broken-windows" metaphor: Like a broken window that invites greater damage, minor offenses not only create fear but, unchecked, can lead to an influx of violent crime and urban decay.

During the 1980s, police began to return to tactics that maintained close links to communities, such as foot and bicycle patrol, permanent beats, and devolution of authority to district commanders, sergeants, and beat cops. Going back to neighborhood patrols was not welcomed by all. Some citizens were suspicious of a police force that was out of touch with the local community. Citizen resentment only exacerbated the police officers' fear of operating in these neighborhoods. But, in other areas, police found willing partners in community groups, business-improvement districts, effective private security, churches, a new breed of public-housing administrators, social workers, school administrators, and local politicians.

Community prosecution in the beginning

While police were the first of the criminal justice agencies to try to improve their relationship with citizens, their appar-

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ent success was not unnoticed by prosecutors. Frustrated by what seemed an endless routine of imprisoning criminals after the fact, many prosecutors began to think that they, too, had to devise tactics that would renew public spaces. Thus, during the late 1980s and early 1990s, district attorneys and county prosecutors began exploring new roles in crime reduction and prevention, and more direct relationships with citizens. In some cases, police spurred prosecutors into such relationships. As Jeremy Travis, Director of the National Institute of Justice, recently put it: "Once police return to communities, they are the magnets that draw prosecutors into the community as well." Marion County Prosecutor Scott Newman described the impetus in a different way.

> I felt instinctively that, as community policing was being implemented in Indianapolis ... what would happen to me if I didn't change the way I did business was the community would draw closer to the police department. And the community and the police department, together, would come to despise my office ... and ... tend to blame [failures] on me as the most visible proponent of the criminal justice system.

Today, a new movement, "community prosecution," is capturing the attention of many prosecutors. In many senses, community prosecution represents the next stage in the dismantling of the old paradigm.

The idea that prosecutors have a broader function than "case processing"—taking cases handed to them by the police after a crime is committed—is not new. The origins of a more complex view of prosecution lay in research conducted by the American Bar Foundation (ABF) in the 1950s, which, by any standard, is one of the most thorough studies concerning the functioning of criminal justice agencies ever conducted. The ABF survey was unique in that it researched and documented the law *in operation* rather than the law *on the books*. The study examined the routine, daily work of police, prosecutors, judges, and corrections officers in three states: Kansas, Michigan, and Wisconsin. The survey found that criminal justice officials confront intricate problems by routinely using their discretion not only to judge whether and how to process and prosecute cases but also to address problems using other methods. Observational data documenting prosecutors' actions

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showed that minor offenses, as opposed to serious felonies, could be considered significant; that full prosecution of cases can sometimes be ineffective; that case attrition—charges dropped by prosecutors short of full prosecution—might reflect a judgment that a problem was best solved outside of prosecution; and that prosecutors could sense, amid the flow of cases, and in the political pressures emanating from the community, the possibility and the urgent need to address certain types of problems.

In these findings lay an alternative to the traditional model of prosecutors as felony-case processors. But it is not hard to understand why the survey's findings failed to capture mainstream attention in prosecution as they did in policing. Much of prosecutors' work is shielded from public and professional scrutiny and tends not to arouse the same public concern as police abuses. A prosecutor's decision not to charge is far less visible to the public than a police officer's decision not to arrest. The case method in legal education, with its focus on adversarial litigation, also fails to motivate prosecutors to play a broader and different role in communities.

Nevertheless, prosecutors' behavior in the ABF Survey illustrated what was, in effect, the first generation of problem solving by prosecutors outside of traditional case processing. The survey showed individual prosecutors solving problems on an ad hoc basis, through informal mediation or other means, with little, if any, oversight. These ideas did not come to dominate research immediately, but they also did not go unnoticed. The director of the ABF survey, Frank Remington, continued to push the idea that prosecutors were essentially problem solvers and decision makers who regularly chose alternatives to formal prosecution. Then, during the 1980s, a second generation of prosecutorial problem solving began, driven by prosecutors seeking to address the growing violence associated with drugs on the streets.

What the drug epidemic wrought

More than anything else, the crack-cocaine epidemic awakened prosecutors to the effects of drugs on neighborhood life and inspired them to change their approach toward their jobs. Prosecutors such as Norm Maleng in Seattle, Michael Schrunk

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in Portland, Robert Macy in Oklahoma County, and Janet Reno in Miami cultivated innovative problem-solving strategies involving aggressive, multifaceted attacks on drug abuse within communities. As Barbara Boland and Kevin Healey have documented, in *Prosecutorial Response to Heavy Drug Caseloads*, drug education, deterrence, and treatment, as well as the prosecution of drug offenders, were among the new tactics initiated by prosecutors.

During the late 1980s, when drug-related crimes threw many Kansas City (MO) neighborhoods into turmoil, prosecutor Albert Riederer thought of using a county sales tax to underwrite a broad-based program to combat drug trafficking, drug use, and drug-related crimes in general. The tax passed. Its revenue now supports a coordinated law-enforcement, drug-treatment, and drug-prevention effort, under the guidance of the county prosecutor, known today as COMBAT (Community Backed Anti-Drug Tax).

In Kings County (Brooklyn), in the early 1990s, District Attorney Charles Hynes reorganized his office to create five geographically distinct prosecution zones. A team was assigned to prosecute felonies that occurred in each zone. Team members would attend community meetings to become acquainted with the specific problems of their zone. To further protect victims of crime, Hynes created a Crime Victims Counseling Unit, a Domestic Violence Bureau, trained special prosecutors to assist victims of specific types of crime, and, following incidents in Howard Beach and Bensonhurst, developed a Civil Rights Bureau to handle hate-crime cases. To address racial tensions, Hynes began Project Legal Lives, which assigned assistant district attorneys to teach local fifth-grade students about the legal issues concerning racial bias and drugs. He also set up citizen advisory councils and a drug-diversion program for nonviolent offenders. Hynes's creations have since been replicated in many other cities.

These and other problem-solving and community-directed efforts began when prosecutors discovered what the police had experienced earlier. Citizens want quality-of-life issues to be taken seriously; they see problems in a neighborhood context. Prosecutors found that the range of problems raised by citizens required them to develop a broader "tool kit" of tactics beyond mere case processing.

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Community prosecution today

At this nascent stage, rooted in the evolving practices of prosecutors in mid-sized to large cities, community prosecution is a concept still defining itself. Three common elements emerge, however.

First, prosecutors are redefining their traditional mission (achieving justice through effective felony-case processing) to include the prevention of crime. They now view crime more broadly—to include not only serious and violent crime but low-level, quality-of-life offenses as well. They are also considering the relationship between the public's fear of crime and crime itself. This broader mission means that prosecutors will place a greater emphasis on the cases and offenders that citizens identify as high priority—whether it be street prostitution, drug dealers, or violent youth gangs.

Second, prosecutors are moving away from a traditional reliance on criminal law and criminal prosecution toward a "problem-oriented prosecution" strategy. In other words, prosecutors are changing and diversifying their tactics. In addition to criminal prosecution, they will pursue civil remedies such as nuisance abatement; they will seek restraining orders to keep dangerous offenders from returning to certain neighborhoods; and they will work with local health- and safety-code enforcement. Prosecutors are also hiring more nonlawyers who can deal effectively with matters of public health, substance-abuse treatment, social services, public relations, community organizing, marketing, journalism, and crime prevention. Former Jackson County (Kansas City) prosecutor Claire McCaskill, who has hired more of these specialists than most attorneys, praises them for prodding prosecutors into thinking "outside the box." Thinking more creatively, these prosecutors then go on to set up community courts, drug-case diversion programs, substance-abuse clinics, and children's advocacy centers. They also obtain funding for and administer programs that target crime, poverty, and quality-of-life issues in depressed neighborhoods and housing developments.

Finally, community prosecutors are collaborating more closely with other criminal justice agencies, the private sector, and citizens. Prosecutors understand that they cannot do their job alone. Thus they now work with citizens and other agents to

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identify priorities jointly, approach crime in a community context, and encourage collaboration that ultimately reduces and prevents crime. Frequently, prosecutors initiate these collaborations, even though the goal may be for citizens to eventually bear the main responsibility for prevention efforts, with prosecutors and police acting as back-up. Across the country, these elements are increasingly visible in prosecutors' offices, and they take a variety of forms in the field.

Making neighborhoods safe

In and around Boston, Safe Neighborhood Initiatives (SNIs) represent a version of community prosecution that has garnered strong support from citizens and police. Former Massachusetts Attorney General Scott Harshbarger (a Democrat), along with Suffolk County District Attorney Ralph Martin (a Republican) and Boston Police Superintendent-in-Chief William Bratton, created the first SNI in the Dorchester neighborhood of Boston in 1993. Since then, the District Attorney, Attorney General, and the police have collaborated in developing several other SNIs. All aim at enhancing public safety in neighborhoods replete with high crime, unemployment, large numbers of immigrants and minorities, and dilapidated housing.

The core principles that guide SNI strategy are: coordinated law enforcement, neighborhood revitalization, and prevention and treatment. Each SNI represents a partnership among the criminal justice agencies, the mayor's office, and the local community. SNI activities are customized for a particular neighborhood, with which prosecutors have become intimately familiar. A Citizens' Advisory or Coordinating Council—comprised of residents, merchants, tenant associations, the Chamber of Commerce, ethnic and cultural or religious groups, school personnel, social-service agencies (many locally based), and elected officials—guides the SNI.

Assistant district attorneys and attorneys general assigned to the SNIs have different responsibilities from those of regular prosecutors. SNI prosecutors screen cases arising in the locality and prosecute them in the neighborhood district courts and Superior Courts, targeting serious and violent offenders, along with minor offenses, that threaten the neighborhood. When in court, prosecutors bring the views of community residents be-

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fore the bench, explaining the impact of the offender or offense on the neighborhood. Good litigation skills must be accompanied by an aggressive pursuit of local crime and safety problems. One prosecutor prepared a genealogy for other prosecutors and police, identifying family members, by name, who were recidivist offenders from the local SNI neighborhood. Prosecutors in another SNI developed a "Johns Project," giving offenders the option of doing community service—cleaning up local streets in full view of the media—instead of going to trial. With police, they planned stings to lure offenders with outstanding warrants to return to the SNI neighborhood to "redeem a prize"; instead, the offenders were arrested.

In most SNIs, a community liaison or an organizer, working for the district attorney or attorney general's office, coordinates the extralegal work of the SNI, frequently with the assistance of the police, and regularly contacts local citizens and groups. But the prosecutors themselves also need strong social skills, as they must get to know, and work with, the citizens. Attending SNI meetings and functions in the community is essential to the job, and SNI prosecutors speak at schools, Kiwanis Clubs, meetings of senior citizens, and tenant associations.

The partnership with citizens through SNIs addresses many social problems. The current priority, put forward by citizens in most SNIs, is reducing domestic violence. Local social workers and health-care providers are joining with police and prosecutors to approach the courts for assistance and to devise a comprehensive strategy. Citizens also help to determine which types of cases, chronic offenders, or offenses are to be pursued by prosecutors. Many cases involve low-level crimes and quality-of-life violations. In the past two years, citizens have reported drug dealers frequenting certain street corners; prostitutes arriving from New York and working out of certain houses; gang activity in schools; residents who fail to control their children, litter freely, and play loud music; and fleets of commercial vehicles illegally parked on narrow public streets, leaving no room for residents' cars.

In the Grove Hall SNI in Boston during 1998, citizens complained about crowds gathering around a few liquor stores late into the night. The drinking and traffic jams were keeping residents awake until 3:00 or 4:00 in the morning. Not

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only did local residents want relief, but they, like the police, wanted to prevent an outbreak of violence. Residents, prosecutors, and police approached the stores to ask for their cooperation. Failing to get it from one, they petitioned the Licensing Board to hold a public hearing in which they would discuss their concerns and ask the board to roll back the store's closing time. After a well-organized hearing, in which citizens, police, and prosecutors all presented arguments, they were successful.

In recent years, crime rates have fallen further in many SNI areas than non-SNI areas. While violent crime fell 6 percent in Boston in 1997-98, it dropped 12 percent in the Dorchester SNI area—and it's important to keep in mind that SNIs are usually implemented in the most crime-ridden neighborhoods. Prosecutors say their cases are stronger, and residents report feeling safer. People have stopped moving out of Dorchester, Chelsea, and other SNI areas. Local realtors report that they are selling more houses in the neighborhood than ever before to previous residents and new residents. Businesses are opening or expanding, and restaurants and shops are opening at night for those who wish to go out after dark.

New modes and forms

In locations around the country, community prosecution has taken different forms. Community prosecution in Austin (TX) is based upon what District Attorney Ronald Earle calls "community justice in Austin." Earle, in office since 1976, has established numerous integrated initiatives between the public and private sectors in Travis County. He drafted state legislation for and spearheaded a Community Justice Council and Community Justice Task Force—groups that bring together elected officials, public professionals, and citizens to oversee all criminal justice operations in the county. After founding a Children's Advocacy Center and establishing its self-sufficiency, Earle passed it over to community control, as he has done with many other programs. Later, he set up several Neighborhood Conference Committees, in which adult volunteers hear cases diverted from the Juvenile Court involving nonviolent youthful offenders. Individual sentences, or "contracts," are created, including restitution, community service, and mentoring.

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For the past several years, assistant prosecutors in Kansas City (MO) have attended neighborhood-association meetings, informed residents about the status of cases involving local incidents, and worked closely with police to address crime and public-safety issues of concern to residents. In August of 1997, County Prosecutor Claire McCaskill created a new neighborhood Justice Prosecution Program in which four prosecutors and a supervisor are assigned to work with police, city agencies, school officials, neighborhood groups, business executives, and church leaders within geographic areas coinciding with Kansas City Police Department patrol divisions. Prosecutors for each area develop crime reduction and prevention strategies, focusing on crime patterns that impact several neighborhoods. In addition, a Child Protection Liason Attorney, who devises plans to reduce child abuse and neglect, is assisting the East Patrol Division, where the highest number of calls originate. A Truancy Coordinator is working with prosecutors to set up truancy projects for schools in each division. The prosecutor-led Drug Abatement Response Team (DART) assists Neighborhood Justice prosecutors in closing down drug houses, working with landlords, and addressing environmental pollution.

In Portland, Oregon, District Attorney Mike Schrunk's neighborhood district attorneys work out of storefront offices, and were initially funded by business owners. The attorneys cooperate closely with citizens and police, focusing on destructive street behavior and low-level offenses that are particularly troublesome in the neighborhood. Rather than simply prosecuting offenders, the neighborhood attorneys pursue a host of other tactics. To reduce illegal camping and massive dumping of garbage, citizens, police, and district attorneys worked out a multifaceted strategy. They posted "no camping" signs, conducted citizen patrols, and encouraged citizens to inform police (who, in turn, would ask the campers to leave). They also had city agencies clear the brush and build barriers to obstruct spaces for camping.

Prosecutor Scott Newman's team of "street level advocates" in Indianapolis are prosecutors who work from district police stations, assisting police and citizens in developing and implementing tactics for addressing neighborhood-specific crime and safety problems. This model of community prosecution has

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gained considerable attention and is being replicated around the country. Within the last two years, Newman has led in developing a community justice pilot project—a community court to be located in a Weed and Seed area on Indianapolis's northwest side.

In each of these cases, prosecutors are emphasizing crime reduction, crime prevention, minor offenses that disturb communities, and strengthening bonds with citizens, other public agencies, and community groups.

Signs of success

Prosecutors, like the police before them, are moving beyond the ideological impasse of "root causes" by attempting to integrate case processing and crime prevention. City attorneys, state attorneys general, and federal prosecutors are also moving toward a problem-solving or community model. They have been joined by probation and parole officers, courts, and corrections personnel, although these latter officials have moved at a somewhat slower pace than prosecutors and police.

The involvement of district attorneys and county prosecutors is important to the development of the new crime-control paradigm, and to collaborative, community-based problem-solving initiatives for several reasons. In a 1992 article, "The Prosecutor As Problem-Solver," law professor and former prosecutor Ronald Goldstock proposed that prosecutors were uniquely prepared to lead such efforts because of their power and authority, their strategic position between police and the courts, their contacts in the executive and legislative branches, and the discretion they exercise. As we look at cities where community prosecution has been cultivated, it appears that the effects are at least as powerful and far-reaching as those of community policing. When community policing and prosecution are combined, the results can be dramatic. Key factors are prosecutors' status as the most powerful locally elected criminal justice officials, and their ability to convene essential players and muster resources from both public and private sectors for use in problem solving.

Evidence is accumulating that community partnerships in crime prevention work. Measures of success include not only the reduction of crime but the willingness of businesses to

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resume or begin reliable delivery services, clean and accessible parks, graffiti-free walls and litter-free parking lots, the absence of scantily clad prostitutes, curtailed drug trafficking, thriving churches, and improved schools.

To return to the example of New York City, the effectiveness of the new tactics and problem-solving partnerships is clear. To begin with, public spaces were recovered, graffiti eradicated, Times Square revitalized, and mass transit rehabilitated. Following upon these achievements by many in New York City, Mayor Giuliani and former Commissioner Bratton reinvigorated the police department. Drops in crime were so precipitous that even skeptical criminologists had to acknowledge that something very dramatic had happened during 1994. Were improving economic conditions the cause? Unemployment never fell below 8.7 percent during Bratton's tenure. Was it new patterns of drug use? No change can be traced in New York City during the first half of the 1990s, when the initial and most spectacular crime reductions occurred. In fact, the NYPD adopted a theory of action, undertook complex organizational changes, and implemented new accountability and planning procedures—all focused on established public goals. A full account of this transformation has yet to be written, and recent tragic events, such as the Louima beating and Diallo killing, have obscured and even threaten New York's achievements.

Potential downsides

We are optimistic about the potential of prosecutors to assist communities in preventing crime in the future. But certain new issues must be faced. The old law-enforcement strategy, to its credit, restrained governmental abuse of power. By adopting a reactive stance to serious crimes, government avoided intruding too deeply into the lives of citizens and communities. Changes in policing and prosecution raise concerns about how such important values should be preserved. In recent years, prosecutors have gained enormous power independent of the movement toward community prosecution. Sentencing guidelines and mandatory sentencing laws that restrict judges' discretion have enhanced that of prosecutors. Prosecutors now adjust the charges—rather than judges adjusting the sentencing—to the idiosyncrasies of individual cases or offenders. Pros-

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ecutors have gained increased control over repeat and violent juvenile offenders through state waiver provisions, and over those not court-involved through early-intervention programs that target at-risk youth.

The shift to community prosecution further empowers prosecutors by taking them into the traditional domain of police. They now have direct contact not only with offenders and victims but with residents and other users of the neighborhood. The prosecutor's expanded tactics increase his power over offenders through the use of nuisance abatement suits, restraining orders, and other civil initiatives that allow prosecutors, as well as police, to avoid burdens of proof and circumvent some constitutional protections that apply to criminal proceedings. Diversion programs, to which prosecutors refer low-level, nonviolent offenders, may serve to "widen the net" by bringing under court supervision greater numbers of offenders who would not have previously been prosecuted.

Other concerns arise as well. By working so closely with police and citizens, prosecutors might become overzealous. They might forget their obligation to protect the rights of those arrested and indicted. Current legal training does little to prepare prosecutors for problem solving; nor do law schools encourage students to become involved in neighborhood affairs. Will the development of closer collaboration with police departments reduce prosecutors' ability to confront police corruption and abuse? Will elected prosecutors be tempted to use their close link to communities for inappropriate political purposes? Will they be vulnerable to charges of being "soft on crime" if they too closely attach themselves to quality-of-life goals?

Safeguarding the role of "achieving justice"

Considerable effort will be required to prevent these lurking problems as prosecutors become increasingly involved in local communities. Although we have no ready-made solution at this time, we do not believe that a remote, professional criminal justice "system" that practically ignores citizen concerns is feasible any longer. Entire communities were abandoned to criminals in the name of "root causes," "individual rights," and "professionalism." But just as community policing

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opened police departments to public scrutiny, community prosecution exposes the actions of district attorneys to review by citizens, local government, and other collaborating agencies.

In the past, prosecutors were virtually unaccountable. They had to survive election, but, except for egregious mishandling of cases, their work was hidden from the public. A decision not to proceed on a case could always be blamed on a poor police investigation in order to conceal attempts to maintain high conviction rates by prosecuting only the most airtight cases. But today, as a routine part of business, community prosecutors report to citizens and police why they took, or did not take, a particular course of action concerning a case or offender from a neighborhood, and what they plan to do next.

In addition to public exposure, guidelines regulating prosecutors' work—developed publicly and disseminated widely—could prevent abuses. One set of guidelines that we recommend would regulate agency relationships with communities. They would, like a charter, describe the values that underlie the collaborative relationship, the boundaries and limits of the collaboration, the principles governing citizen participation and representation, and conflict-resolution mechanisms. Another set of guidelines that we support would focus on civil initiatives by defining their purpose, the conditions under which they should or should not be used, the procedures for their use, and the potential for their abuse. While such guidelines will not answer all of the questions concerning this new form of prosecutorial authority, they will help to hold both prosecutors and communities accountable for their actions.

A new sense of excitement and optimism is enveloping crime-control efforts today. Old certainties have been overturned. Enthusiasm is growing as communities experience success in reducing crime. The gains that we have described are not in "easy" or "wealthy" neighborhoods; they have occurred in economically struggling neighborhoods with large minority and immigrant populations. Such achievements should not be lightly dismissed. Confident in the closer ties they have formed with police, and those that they are forming with prosecutors, citizens appear to be refusing to revert back to old strategies, or to allow police and prosecutors to retreat. This bodes well for the future of law enforcement and the safety and well-being of our citizens.

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How federal prosecutors can reduce crime

ELIZABETH GLAZER

THE striking drop in crime over the last few years, particularly in New York City, but also notable in some other cities, undoubtedly has many causes. The changes in policing methods have attracted the most attention. Police departments—and this is particularly the case in New York—have discovered the efficacy of problem-oriented policing, developing methods of collecting data on crime rapidly and accurately, mapping the location of different kinds of crime, discovering concentrations of and connections among crimes, deploying resources strategically, and anticipating trends. They have developed goals that measure not process but achievement—for example, not how many arrests have been made but has there actually been a reduction in crime.

Some local prosecutors are adopting similar approaches. They have begun to see their role as one piece of a puzzle: They are part of a larger system to reduce crime, rather than independent operators who simply prosecute one case after an-

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other. While the primary task of the prosecutor is, of course, to prosecute individual cases, some district attorney's offices have also begun to work with non-law-enforcement public agencies and community groups on specific local issues. Early involvement of these groups with truancy, for example, may prevent many youths from graduating to more serious crimes.

In this revolution, federal prosecutors have generally sat on the sidelines, adhering to the traditional model of case-processing. Their attention remains on the specific case, not on crime as a whole. By defining his role in this way, the federal prosecutor has side-stepped any responsibility for crime reduction and consequently for crime control. But this has begun to change, particularly in New York, where federal prosecutors are developing a strategic, rather than a responsive, role (parallel to the extension of police activities beyond the simple response to a call for help). As the Chief of Crime Control Strategies for the U.S. Attorney's Office for the Southern District of New York, I have been deeply involved, for some years, in my office's efforts to bring about this change, and, along with others in law enforcement, I believe this contribution to crime reduction justifies a new strategic role for federal prosecutors. In this article, I will spell out this new role and how it may be further developed.[1]

Constitutionality vs. utility

Why should a federal prosecutor be involved in prosecuting local crime? Do we not have state and county and city agencies for that? It seems a far stretch from the explicit constitutional grant of federal authority in matters concerning treason, piracy, and counterfeiting to the broader grant of power under the commerce clause, which enables Congress to authorize, for example, federal prosecutions of some domestic-violence cases. There is an extensive literature criticizing federal activity in this arena, most recently in a report issued last month by an American Bar Association committee, chaired by former Attorney General Edwin Meese. I do not underestimate the serious and difficult constitutional concerns raised by the federal government's involvement

[1] The views expressed here are not necessarily those of the U.S. Department of Justice or the U.S. Attorney's Office for the Southern District of New York. A longer version of this article appears in 26 *Fordham Urban Law Journal* 901 (1999).

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in an area traditionally reserved to the states, but the practical and legal reality is that federal participation in criminal prosecutions is not a recent phenomenon. And this participation is now so wide and deep that it is more sensible to see how it may best be applied, rather than to consider how it can be pushed back into a neatly defined constitutional orbit.

What should be matters of federal concern and what should be matters of local concern are sometimes simply decided by the length of time the federal government has been involved in an area. For example, it is hard to imagine matters that are more classically local than the traditional rackets of mafia crime: gambling, loan-sharking, and prostitution. Yet federal mob prosecutions are now viewed as uncontroversial and, by some, as a primary area of federal involvement. How different, from a federal perspective, is the extortionate extension of credit to a small businessman by a mobster from the robbery of several grocery stores by a local gang? As a legal matter, the courts have shown little interest in drastically reducing federal power in the area of violent crime. Ironically, it has been administrations most protective of states rights, for example the Reagan administration, that have been the most active in extending federal power in criminal prosecutions.

Are there any advantages to the federal government having this power? Several are evident. First, Congress has given federal prosecutors powers that, if used properly, would enable them to have a comprehensive effect on various groups of serious criminals; such powers may not be available to local authorities. For the most part, crime rates do not reflect the spontaneous, unconnected actions of hundreds or thousands of individuals. Rather, there are organized and loose associations in the criminal world that often fuel interconnected crimes. There are also repeat locations—buildings or blocks that account for a large proportion of a neighborhood's crime spikes. Federal laws, such as racketeering (which permits the single prosecution of a group of interconnected defendants and crimes) or forfeiture (which targets particular crime-magnet locations), provide significant legal weapons not available to the states. And the nationwide reach of federal power makes it possible to build prosecutions extending beyond state borders. (For example, federal gun-trafficking laws could enable the wholesale interdiction of crime guns from one state to another.)

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In addition, because federal officials are not responsible for the day-to-day enforcement of the criminal laws, they have the luxury, both politically and substantively, to pursue long-term investigations of the most serious criminals and criminal organizations. By bringing federal laws to bear on such targets, the federal government can also incarcerate repeat felons. The dispersion of serious felons to prisons far from their homes and old associates can significantly weaken the criminal influence of any one group.

Finally, the federal government spends a great deal of money on programs directly linked to crime reduction (COPS grants, HUD Drug Elimination Program, etc.) as well as on numerous programs that could be coordinated with broader crime-prevention efforts than law enforcement by itself can mobilize (e.g., Health and Human Services and Department of Education grants relating to after school programs). There is presently no organized effort by the federal government to identify or leverage the links among these different initiatives. Yet a federal government serious about helping local authorities fight crime and coordinating its efforts with theirs would begin to gather and analyze such information.

The new approach

Over the past several years, as federal prosecutors have become more deeply involved in violent-crime prosecutions, the shortcomings of the traditional case-processing model of prosecutorial behavior have been exposed. A federal prosecutor who is working on a neighborhood-gang case finds himself in a different role from a federal prosecutor working in traditionally federal areas of concern—for example, bank fraud. In a bank-fraud case, the investigating agency usually has a well-established and exclusive relationship with a federally chartered bank. A bank that has been defrauded knows which squad to call at the Federal Bureau of Investigation, and that squad has been working with the federal statutes long enough to know how to conduct the investigation until the case is ready to bring to a prosecutor for indictment or further scrutiny.

A completely different set of expectations surrounds a violent-crime prosecution. It is highly unlikely that investigators, local or federal, will bring a ready-made gang case to a pros-

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ecutor. The more likely course is that the putative gang case will begin with a single homicide that the state, for evidentiary or procedural reasons, cannot prosecute. In this kind of case, the police will usually contact the federal prosecutor, rather than their counterpart in the federal investigative agency, because the question the cop wants answered—"Do I have enough evidence to arrest the target?"—is one the prosecutor is uniquely equipped to handle. But to the federal prosecutor, it may be more than a local homicide. It may become the first piece in a federal gang case that implicates an array of federal laws and roles. And the ability exists, through these laws, to arrest not simply a single defendant for the murder but his entire crew on the range of crimes they have committed.

Through this broader prosecution, the prosecutor can make an impact on crime within a neighborhood. The role the prosecutor plays will also enhance the impact of the case, as it falls to the prosecutor—the first point of contact with the local authorities—to determine whether there are connections between the murder case and other cases that federal investigative agencies might be pursuing in the same neighborhood. Finally, in those jurisdictions where the police chart the impact that a particular case has on the crime statistics of a neighborhood, these unconsciously strategic approaches may become purposeful, as the police push the prosecutor out of his case-centric view to a vantage point in which entire geographic areas become the units of concern.

A federal prosecutor may thus find himself at the center of a strategy to address neighborhood crime problems. In time, he will begin to use data to select areas where his particular skills will have a measurable impact. To his surprise, the federal prosecutor may find that his position confers upon him untapped advantages in planning the strategic deployment of resources against a particular crime problem.

Impartial spectator

Federal law-enforcement agencies are highly balkanized in their approach to crime. In New York City, for example, there are at least 20 federal agencies working in various areas of overlapping, as well as exclusive, jurisdiction. For many reasons (some inadvertent, some intentional), not every agency

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knows whether another may be conducting a parallel and ongoing investigation. The Bureau of Alcohol, Tobacco and Firearms (ATF) may be investigating gun running out of a grocery store in which the Department of Agriculture is investigating food-stamp fraud. There is no natural connection between the two agencies, and no particular reason why these two agencies would think to coordinate their efforts. Yet, in this example, their investigations would certainly yield information of mutual interest if their targets, witnesses, and proof overlap.

In a world where the federal prosecutor plays a crime-fighting instead of case-processing role, serendipity can give way to methodical and forensic connection making. The federal prosecutor already sits at the crossroads of each of the above investigations and cases. He has cut the subpoenas to the grocery store in the Department of Agriculture case and authorized the consensual recordings in the ATF case. He has the opportunity, if not yet the tools and the role, to make the connections among the many players on the street. Can he use his placement at the center of this flow of information to make connections methodically? I believe he can, and I will show how.

The federal prosecutor stands differently in relation to the evidence than any other agency. Each agency has its mission to fulfill, usually related to the subject matter of its jurisdiction. Thus the Immigration and Naturalization Service's primary concern is the identification and prosecution of illegal aliens; the Department of Labor's may be the identification and suppression of unfair labor practices in sweatshops; the FBI's may be the cracking of an international alien smuggling ring; the police department's public-morals division may be concerned with the proliferation of houses of prostitution. In some cases, these areas of concern and responsibility may be connected to one another. The smuggling ring that the FBI is investigating brings illegal aliens into the United States, where the INS is charged with finding them. The witnesses the FBI wants to use in its smuggling case may also be the targets of INS's prosecutorial efforts, as well as the victims and witnesses to the unfair labor practices that the Department of Labor is trying to uncover. And the women that the public-morals division is rounding up may have been forced into prostitution by the leader of the smuggling ring as a method of ensuring payment of their transportation debt.

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Who puts this puzzle together so that every piece of overlapping evidence is used to ensure that the crimes in this vignette do not continue? No single investigative agency has the interest or incentive to devote resources to a case that may go well beyond the agency's primary mission. In addition, the imposition of criminal sanctions—the goal of most investigative efforts—may not be the best remedy for the various issues raised in this example. One could imagine a solution that would embrace not only criminal prosecution but also civil and regulatory remedies. But such solutions would require information from non-law-enforcement sources, and sustaining crime reductions for the long term would require the participation of diverse non-law-enforcement agencies.

The prosecutor is the only player on the law-enforcement side who is not committed, simply by agency affiliation, to weigh one element more heavily than another. Whether more than one agency is necessary to develop a case, or what role each of the participating agencies plays, although matters of concern, are not central to the prosecutor. As the neutral party, the prosecutor is in one of the best positions to develop strategy and negotiate agency divisions.

Thinking strategically

The familiar role of the prosecutor as legal advisor to the investigative agencies can play out in other ways. For example, in a police-department effort to reduce car thefts, it may turn out that the thefts are carried out by organized-crime rings that steal the cars for export to other countries. A federal prosecutor may play an important role in shaping the investigation, when the other organizations involved have different priorities: The police department's interest may end at the water's edge; the Customs Service's interest may focus on the containers and their destination, but leave behind the indigenous rings of thieves; the Coast Guard's concern is boarding the ships, examining the manifests, and engaging another agency, such as the FBI, to trace the pedigree (legitimate or criminal) of the vehicles. In organizing the various agencies' skills and interests, the prosecutor who thinks strategically will look for an effective method to suppress the thefts—a method that may only incidentally entail arrests. It may be that chop shops play the pivotal role

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between the rings that steal the cars and the figures who organize the shipments overseas. Thus shutting down the chop shops—whether through civil action, municipal regulation, or something else—could be the most effective means of reducing the incentive the street groups have to steal the cars, and of enhancing the risk to shippers of exporting the stolen cars. The prosecutor who thinks strategically will not only look beyond the single case but will ask: How prevalent is this activity in other parts of the city? What kind of comprehensive method could be used to shut down those other networks? Are there other disincentives, besides arrests, to criminal activity?

Thus the area that even the most traditional investigators and prosecutors would acknowledge is within the prosecutor's primary jurisdiction—the interpretation and execution of the laws—becomes important at every turn, not only in the prosecution but the investigation too. The laws and procedures will guide whether pieces of evidence are, or are not, admissible, and thus whether a case will end up in federal or state court. This kind of analysis is more akin to the classic prosecutor's role of thinking inside the case. But by pushing each aspect of the case, and by trying to put it in the context of a neighborhood's or city's crime conditions, even a single case can lead a prosecutor to think strategically about the broader trends involved, and what resources are needed to have an impact on that larger problem.

In most joint federal and local efforts to combat violent crime, the federal role has been, for the most part, to prosecute the exemplary case. But, viewed more broadly, federal laws permit a comprehensive attack on interlinked criminal associations within a particular neighborhood. Most neighborhood criminal networks operate in the same way as legitimate neighborhood networks. A resident knows where to buy his food, get his shoes fixed, and his clothes cleaned. In the criminal world, the drug dealer knows where to get his phones cloned, his cars outfitted with traps, his money sent out of the country, his rivals taken care of. For the most part, federal law enforcement misses the connections because at least five different agencies deal with the drug dealer just mentioned. But by working with both local and federal investigative agencies, federal prosecutors can use federal laws to root out these criminal networks that continue to operate, even after the

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"big fish" are incarcerated. Federal prosecutors may also be well-positioned to notice and pursue intersections between different types of cases, such as drugs and guns, that are now the provinces of two separate agencies.

The ability of the federal prosecutor to think in this way depends upon his moving beyond the case-centric view of the world to a neighborhood-impact view. Although federal prosecutions represent only a small percentage of prosecutions nationwide, they probably target the most serious criminals. The presumption upon which this strategic redeployment must rest is that the federal prosecutor understands the particular crime problems of the city in which he works.

Where is the federal office of strategic planning?

In many large cities with effective and strategic crime policies, police departments rely upon a unit whose mission it is to look at the big picture. No equivalent office of planning and development exists in the federal system, either in the investigative agencies or in the prosecutors' offices. Of the enormous quantities of data compiled by federal agencies, none is used as the basis for planning strategy or tactics at the national or local levels—perhaps because the information is neither geographically specific nor timely enough to rely upon in making strategic decisions. Moreover, in no sense is the data used to measure the accountability of federal agencies for rises or drops in crime.

Federal investigative agencies face two major obstacles in describing and implementing effective anticrime strategies tailored to a district's crime conditions. First, in the area of violent crime, a federal investigative agency must rely upon local investigators for a detailed knowledge of a neighborhood's or city's crime conditions. Sometimes a history of rivalry or dissension between the federal and local agencies may make it difficult to get an accurate or complete sense of the trends in an area. Even in instances where past relations have been harmonious, sometimes the local investigators may not have collected or analyzed the data in a way that is useful to a federal agency. The police department's legitimate interest in immediate arrest and suppression of "hot spots" may mean that certain worthy targets that require longer-term efforts slip out of their purview.

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Second, a federal investigative agency is not always best positioned to fashion a comprehensive strategy because, as I have noted, each agency has its own missions and priorities. Left to their own devices, as they are, each agency will draft a strategy in which their agency's particular jurisdictional features are most prominent. These interests may well intersect, but no comprehensive strategy will emerge.

For many reasons, federal prosecutors are well situated to fill this void. First, they do not need to expend many resources to coordinate investigative information, as they already possess the investigative information of a score of agencies. Second, they have an omnivorous crime-fighting mission that requires them to view investigative information without reference to the many different priorities of the array of federal agencies. This allows them to be a bridge between sometimes warring agencies or jurisdictions. Third, they have the ability to deploy comprehensive federal laws that, standing alone, could have a significant impact on crime. And finally, because of their disinterested perspective and their knowledge of legal mechanisms, they are well positioned to bring the federal players (and, in some instances, the local players) together. But to play these roles, federal prosecutors will have to organize the information at their disposal and answer some tough questions about the reach and limit of their role in crime prevention.

New York's experience

In the U.S. Attorney's Office for the Southern District of New York, prosecutors have begun experimenting with a way of organizing existing information so that it yields previously hidden connections. Critical information from every investigation and case is mapped electronically, including crime locations, defendants' places of residence and arrest, and the locations of search warrants. A prosecutor working on a crime that took place on a particular street corner can pull up a map of the rest of the office's cases and see whether the INS has just executed a search warrant there, or whether the DEA is conducting a drug investigation across the street.

This program can help a federal prosecutor's office to plan strategy by allowing the office's entire docket to be viewed at a glance. That glance might indicate that 10 different agencies

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have cases or investigations in a particular area of the city with a severe crime problem. Knowing about that serendipitous concentration of resources may spur the prosecutor to meet with the agencies to discuss how their information on the neighborhood's crime conditions intersects and how they can ameliorate those conditions. Or the police department might provide a map of open homicides, which, matched up against the neighborhoods of which federal prosecutors have knowledge, could lead to the murders' solutions. Mapping is plainly just a tool, not a strategic solution, and a tool whose use may be limited to certain kinds of cases. But it is one example of how organizing and sharing information can help to reduce crime rates.

In addition to the technical tools, a prosecutor's office that is serious about strategic deployment of its resources needs analytical and investigative manpower. In the example of the car theft and exportation rings mentioned above, the analytic team might compile the lists of freight forwarders connected to the containers of suspect goods that the Coast Guard searched, and trace those shipments back to common names or addresses. Or the team could look at the chop shops and match them against the lists of municipal violations issued by Consumer Affairs or Buildings.

Finally, within the U.S. Attorney's Office, a high-ranking person must ensure that the strategies are integrated into office operations. It is not necessary for every prosecutor to be converted to a method of strategic thinking, as long as those responsible for setting the direction and goals of the office are. The reigning culture of most prosecutors' offices may make this difficult because the excitement and satisfaction of prosecuting today's mob boss will outshine the prospect of devising a strategy to ensure tomorrow's murder rate is reduced. But once it is understood that the strategic function is essential to a prosecutor's job, this will change.

Racketeering, guns, and forfeiture

What are the weapons of greatest impact that the federal prosecutor can mobilize? Among the many available, three have proven or could prove to have a significant and lasting effect on crime conditions: racketeering, gun trafficking, and forfeiture laws.

Two truths about crime should inform law-enforcement policy.

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First, a small number of people commit a large percentage of the crimes. If a city has 2,000 robberies a year, the police are not looking for 2,000 robbers; if they arrest and convict 200, the robbery rate will tumble. Second, most violent crimes, although investigated case by case, are connected, in some way, to a neighborhood's other crimes. Thus, to have the greatest effect on a neighborhood's crime rates, law enforcement should switch from a case-by-case approach to an area-by-area approach.

Police departments—the first line of response to violent crime—must react quickly when a crime has been committed. Sometimes this means that a defendant is arrested immediately for a relatively minor, but easy to prove violation, rather than later, for a major violation that more closely fits the defendant's activities, but may be harder to prove. Sometimes the investigation solves the major violation but then proceeds no further. If it had continued—investigating the array of crimes the defendant had committed with a changing group of accomplices—it could have had a greater impact.

This assumption is at work when the federal government uses the Racketeer Influenced and Corrupt Organizations Act (RICO) to combat criminal activity. Beginning in 1992, the U.S. Attorney's Office for the Southern District of New York conducted an experiment in the use of racketeering laws to reduce murder rates. In 1991, there were 2,154 murders in New York City. First, haphazardly, and then more methodically, the Southern District began picking particular targets in areas where murders were high. From 1992 to 1996, the office filed 20 significant racketeering indictments against violent gangs, charging 330 defendants with 205 murders.

Many of these cases concerned criminal activity that was mostly local, such as the now-extinct traditional Asian gangs that operated largely in the Chinatown area of Manhattan. Police crime statistics dramatically demonstrated the immediate impact of incarcerating a small group of serious repeat offenders. In the six months that preceded the November 1994 takedown of two significant Asian gang cases, the local precinct had eight murders and fifteen nonfatal shooting victims. In the six months that followed the takedown, the precinct had one murder and five shooting victims. Between 1993 and 1996, the U.S. Attorney's Office prosecuted another five Asian gang cases, charging 129 defendants with

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30 murders. In 1993, the precinct had 10 murders; in 1996, it had two. Another series of large-scale cases in the Harlem area of Manhattan and the Mott Haven area of the Bronx had a similar effect, reducing the murder rate in those neighborhoods by more than half. If murderers, who surely made their debut in less serious crimes years earlier, are taken off the streets, crime rates will drop.

Trafficking laws could also play a role, interdicting crime guns from a particular crime-ridden neighborhood. Again, the key is to move from the case-by-case method to a wholesale method that tracks the gun's movement—from the manufacturers, through the various dealers, to the individual purchaser. Investigations usually start with the recovery of the gun and work their way back. But there are other ways to identify trafficking networks and traffickers. Investigators in a city like New York, where the vast majority of the guns used in crimes come from out of state, could rank not simply the top source states but the top source stores, as a first step in turning off the spigot. As in crime statistics generally, it is unlikely that the thousands of crimes involving guns came from thousands of different stores. This does not necessarily mean that the store or store owner has done anything criminal, but it begins to identify the traffic routes, which can then be worked from both the supply and demand sides to reduce the flow of guns.

Finally, focusing on recidivist locations as well as recidivist defendants could also produce results, as every high-crime neighborhood has at least one place that especially attracts drugs, prostitution, or gambling. Federal forfeiture laws are, of course, controversial, but when used strategically, as in New York, they have been remarkably successful. Yet seizing a building is not enough. The federal government could auction it to nonprofits for a small amount. Such groups might then not only run the building but train its residents in bookkeeping and property management. Thus a mere law-enforcement measure can have broader effects, establishing certain core values that will contribute to neighborhood stability.

Crime in context

Why should law enforcement take on the broader responsibilities and functions that I have described? Of course, law-

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enforcement agencies, or any group of agencies for that matter, cannot solve the crime problem independently. But each agency holds a piece of the puzzle: The police department knows where the rapes occur, and its police officers, who work daily with the Housing Authority, may have some influence in ensuring that a street lamp is put in the high-crime spot. The cops see the same kids repeatedly, who, at different points in the cycle, are also seen by the schools, social-service providers, and others. And, at every turn, federal dollars are involved: A COPS grant may have put the truant officers on the street; HUD may be funding the Housing Authority's Safe Streets efforts. A methodical identification and use of all this information could play an important role in solving the immediate crime problem. And it could also help to address the non-law-enforcement aspects of the crime problem, contributing to the long-term health of our neighborhoods.

Federal prosecutors, long accustomed to fighting crime case by case, and unaccustomed to thinking of themselves as "local" officials who have a direct impact on their districts' crime rates, may initially dismiss this approach as social-service work, not crime fighting. Yet the irony is that it is precisely prosecuting cases without grasping the larger context that will ensure the Sisyphysean continuation of law-enforcement "initiatives." As part of a joint federal-state effort to curb violent crime, the feds may arrest the streetcorner crack gang in the exemplary case, hold them without bail before trial (thus demonstrating to the community the immediate effects of law-enforcement action) and send them to distant states upon their convictions to serve lengthy sentences. But, unless the schools, social-service agencies, and others also get involved, helping to identify and assist young gang runners, those kids will become "perps-in-waiting" for law enforcement's next initiative against street violence.

What can the federal government do to ensure that reduced crime rates are sustained for the long term? As I have noted, they can begin to think in a strategic and comprehensive way, rather than in a reactive and episodic one, about both the deployment of federal laws and the organization of federal resources and information. Sometimes this process can begin in a relatively simple way. I have been involved for some time

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in an effort that has combined the resources of my office, the local prosecutor's office, and the precinct commander, with community groups and service providers. We map out crime hot spots and consider a variety of actions that might be taken to further both enforcement and prevention strategies which range from targeting recidivists to engaging cops in after school and summer-camp activities with neighborhood children. To direct our law-enforcement efforts, one of the first steps of this hybrid group was to map crime hot spots against after school and other activities for kids. Not surprisingly, crime persisted in those places where the neighborhood lacked resources for children. Law-enforcement officials can now deploy their enforcement efforts more effectively, and service providers have a better understanding of where educational and recreational programs are most urgently needed.

In this effort, prosecutors prosecute cases, and social-service agencies run the programs, each operating in their sphere of competence. But each also understands how their functions intersect with, and enhance, the efforts of the other. Next time the gang squad picks up a Blood who slashed a rival, instead of "cutting loose" the Blood's 10-year-old sidekick, the squad will know where that child can find more productive activities. By doing so, the squad will have "fought crime" as surely as if they arrested that child in five years for a slashing of his own.

It would be naïve and premature to think that the further development of such approaches is a panacea. But it is not too far-fetched to think that by strategically identifying impact cases, purposefully deploying federal laws, and tracing the intersection between enforcement actions and the related, if uncoordinated, federally sponsored non-law-enforcement programs, federal prosecutors can, in their new roles, improve neighborhoods and community-police relations. The result will be lower crime rates for the long haul.

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The costly compassion of the ADA

ROGER CLEGG

THERE is no denying the good intentions and laudable compassion behind the passage of the Americans with Disabilities Act (ADA). This sweeping piece of legislation was passed in 1990, with overwhelming bipartisan majorities in both houses of Congress, and eagerly signed into law by a supportive President Bush.

The ADA regulates employment in both the private and public sectors, including all state and local government services, with especially elaborate provisions on public transportation, public accommodations, and telecommunications. Its scope is enormous. All companies with 15 or more employees are covered as employers. "Public accommodations" specifically include all hotels, theaters, stadiums, auditoriums, banks, laundromats and dry cleaners, barber and beauty shops, travel and shoe-repair services, retail stores of any kind, funeral parlors, gas stations, and many, many others.

The ADA does much more than ban discrimination against the disabled, if by discrimination we mean, as the dictionary

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says, treating someone differently because he has a particular characteristic. The ADA does ban this, of course. It also bans neutral practices that have an unintended, but disparate, impact on the disabled. An employer who requires employees to be literate can be sued if this demand disqualifies a disproportionate number of people with a given handicap. The employer would then have to show that his requirement is "job-related for the position in question and consistent with business necessity." The ADA regulations say that only criteria related to the "essential function of the job" can meet this standard. If the government concludes that the essential functions of the job do not include reading, the employer must be content with illiterate employees.

But the prohibitions of both disparate impact and disparate treatment are barely worth noting since other civil-rights laws have commonly been interpreted this way, at least since the early 1970s. What distinguishes the ADA is the fact that it goes well beyond prohibiting states and businesses from discriminating, even as broadly defined. The ADA says that the disabled are entitled to all "reasonable accommodations." Thus the Justice Department recently—and quite correctly—told a federal court that it "would have been in error" to instruct a jury that defendants were required only to ensure that the disabled "were treated the same as all other employees." And Attorney General Janet Reno was wrong in declaring—after the Justice Department forced Wendy's fast-food restaurants to reconfigure their waiting lines—that "people with disabilities do not want special treatment—they just want to be treated like everyone else" and that it is just a "stereotype that people with disabilities need special treatment."

The ADA requires that businesses be changed to suit employees or customers unless doing so would result in an "undue hardship" or a "direct threat to the health or safety of others." Both of these exceptions are defined quite narrowly. The Equal Employment Opportunity Commission (EEOC), for instance, has said that the "direct threat" exception requires a "high probability" of "substantial harm."

With such a comprehensive scope and such broad requirements, one would hope that the statute's definition of "disability" would be precise. It is not. A disability for any individual is

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defined as follows: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." Defining the meaning and scope of terms like "substantially limits" and "major life activities" has resulted in endless litigation.

Real life applications

The ADA did not become fully effective until two years after its enactment. During this hiatus, the Justice Department and the EEOC busily prepared regulations, "technical assistance manuals," handbooks, flyers, web sites, and other interpretations of the ADA. Then, slowly, the cases began to wind their way through the courts. In the 1997-98 term, two cases finally reached the Supreme Court. (Five more decisions on the ADA will be handed down in the 1998-99 term.) While the ADA has spawned cases of astonishing variety, these two cases illustrate many of the statute's problems.

The first decision was *Pennsylvania Department of Corrections v. Yeskey*, in which the Court ruled that the ADA applies to state prison inmates. The members of this notoriously litigious group—inmates have a lot of time on their hands and some familiarity with the legal system—hardly need encouragement to file complaints. But now they have the Court's blessing. Yeskey complained that his history of hypertension should not have disqualified him from the prison's boot-camp program, and now he will be able to bring his complaint into the court system under ADA.

In the second decision, *Bragdon v. Abbott*, the Court ruled by a five-to-four vote that the plaintiff was covered by the ADA from the moment she became HIV positive. The dentist who had refused to fill her tooth in his office—insisting instead on what he thought would be safer facilities in a hospital—can win only if his refusal is shown to be supported by medical or other scientific evidence of a "significant risk." As the Court declared, the dentist "receives no special deference simply because he is a health care professional."

These two Supreme Court decisions were atypical in that neither involved a mental disability, the single largest category of complaints received by the EEOC. As burdensome as the

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ADA has been with respect to physical impairments, its coverage of mental disabilities raises even graver difficulties.

As the psychologist G.E. Zuriff warned two years ago in these pages, the ADA's prohibition of discrimination on account of mental impairment "threatens to undermine our culture's already fragile sense of personal responsibility."[1] He lamented the "psychiatric profession's success in medicalizing emotional problems" and rightly warned that "the social implications of treating personality disorders on a par with physical disabilities are momentous."

The central problem, according to Zuriff, is the ADA's reliance on the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM), which he criticized for a variety of reasons, including the intrusion of politics and ideology into the DSM's supposedly scientific and medical view of disorders. Since then, the EEOC has compounded the problem by issuing "enforcement guidance" that relies heavily on the DSM.

Justifying the ADA

Before considering in greater detail the enforcement problems that the ADA has raised, it makes sense to scrutinize the statute's basic rationale. Civil-rights laws are usually justified on the grounds that discrimination is either irrational, immoral, or both. But these justifications have not worked well for the ADA.

It is certainly not irrational to avoid the costly expenditures required for the extensive accommodation of people with disabilities. It is also unlikely that the government is in a better position to do cost-benefit analyses than the company directly involved. It has been argued that while it is not in any one company's interest to hire a disabled person it doesn't want, society as a whole is better off if it does because many disabled people will become productive workers. But this argument fails both logically and empirically.

Logically, companies will hire workers who increase productivity with or without the ADA. The ADA has an impact only where hiring the worker would not help the company in

[1] "Medicalizing Character," *The Public Interest*, Number 123, Spring 1996.

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the first place. The argument that, in the aggregate, the ADA still helps productivity is like the joke about the car dealership that claims it can afford to sell cars at a loss because of volume. As an empirical matter, the ADA apparently has moved fewer than 1 percent of the disabled from welfare to the workplace, according to Mitchell LaPlante of the University of California–San Francisco.

Indeed, there is a growing concern that the ADA may increase unemployment among the disabled because employers fear "hiring a lawsuit." Russell Redenbaugh, a member of the U.S. Commission on Civil Rights and himself blind, and several economists at MIT have documented this fear.

With respect to the morality of the ADA, the problem is that there are so many different definitions of "disability." Even if it is wrong for a restaurant to refuse to replace steps with a ramp, it certainly does not seem immoral to avoid hiring people who are rude to customers or co-workers (even if—as the EEOC has ruled—rudeness can be the manifestation of a disability). It also does not seem immoral for a dentist to want to treat an HIV-positive patient where it is safest, or for a police force or trucking company to insist, for safety reasons, on two good eyes for its officers and drivers. Nor does it seem wrong for a prison to bar physically or mentally handicapped inmates from boot-camp programs. It also does not seem moral to force an employer to hire a disabled person when doing so means that a better qualified, nondisabled person will be turned away.

The core of the ADA's rationale is that Congress felt so sorry for the disabled that it was willing to force other people to help them, at considerable expense. Certainly, private employers are entitled to ask why the government does not directly come to the aid of the disabled—or at least pay them for *their* trouble.

Four degrees of disability

Whatever one concludes about its theoretical justifications, the ADA has unquestionably raised important practical problems for the private sector. A business must accommodate the disabled unless the individual is so disabled that it would be an "undue hardship" or create a "direct threat" to health and

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safety to do so. The ADA effectively requires a business to divide its employees and customers into four categories.

First, there are those who are unimpaired. The company is not forbidden from discriminating against them (but why would it choose to?). Second, there are those who are impaired, but not so impaired that they can claim to be disabled. They too can be discriminated against. But at some point, the line is crossed, and the business finds itself in category three, facing an employee or customer whose impairment is serious enough to qualify as a disability. Now discrimination is forbidden and reasonable accommodation is required—unless the next line is crossed, which separates the disabled who have to be reasonably accommodated from those whose disability is so severe that accommodating them would present an undue hardship or direct threat. In that case, the business is again off the hook because neither nondiscrimination nor reasonable accommodation is required.

In sum, the business must distinguish finely among the various degrees of impairment if it is to know what its legal obligations are. And the penalty for guessing wrong is that the business might lose a very expensive lawsuit—or win a very expensive lawsuit if it guesses right.

The lawsuits themselves can have a looking-glass confusion about them. The plaintiff is trying to show that he belongs in category three, not two or four. Consequently, in the early stages of the case, he will emphasize the severity of the disability and the variety of limitations it places on him; the businessman defendant, conversely, will insist that the plaintiff is really quite competent and capable. But then, if the premise of disability is deemed valid, both sides must switch gears, with the plaintiff now arguing that, notwithstanding this serious disability, he can, with only modest help (reasonable accommodation) from the business, do the job perfectly well; the business, on the other hand, will now insist that the disability is so severe that any attempted accommodation would be prohibitively expensive or unreasonably dangerous.

Reasonable enforcement

Civil-rights laws, particularly when misapplied, can compromise the efficiency and productivity of business. Indeed, it

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is important to recognize that antidiscrimination law is not only a social issue but an economic one too. It is a form of government regulation that can be very expensive. The *Washington Post* recently reported one estimate of a "$5 billion price tag for businesses forced to comply with the law."

The record of the U.S. Justice Department's Civil Rights Division is instructive. Compared with the EEOC and the private plaintiffs' bar, at least, the division is cautious in its civil-rights theories. (According to a recent American Bar Association study of practically all ADA complaints filed to date, 92 percent of those decided in court have been rejected, along with 86 percent of those decided administratively.) So rather than single out a few claims by private plaintiffs or even the EEOC, let's examine the recent record of the Justice Department. And if some of the positions that the Civil Rights Division has taken raise eyebrows, just imagine what the EEOC and plaintiffs' bar are arguing.

Much of the division's work has focused on police and fire departments. The division forced a fire department to hire a firefighter who was blind in one eye, and successfully settled cases involving one firefighter applicant with a lung disease and another with back problems. The division also successfully intervened on behalf of a firefighter who was deaf in one ear and wanted a job as a paramedic. It also told a county, which had previously enforced the medical standards of the National Fire Protection Association, that it could not automatically exclude hearing-impaired volunteer firefighters.

The Civil Rights Division has also forced two Mississippi county courts to ensure that deaf individuals are allowed to participate fully as jurors. A county judge had argued that the case before him was too technical for a deaf juror and that an interpreter would distract the other jurors, but the division declared that "a prospective juror's deafness does not render him or her incapable of performing the duties of a juror." Accordingly, the division has required courts to provide qualified interpreters for hearing-impaired jurors. (It has also opposed rules disqualifying the blind from jury service.)

The Civil Rights Division has also aggressively applied ADA to a variety of state-licensing agencies. In *Bartlett v. New York State Board of Law Examiners*, the division argued, on appeal,

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that Judge Sonia Sotomayor's decision, requiring that a bar applicant be given a variety of accommodations when she took the bar exam, failed to go far enough. Judge Sotomayor's decision hinged on her conclusion that "working" as a lawyer was a "major life activity," but the division filed an amicus brief on appeal urging an affirmance making clear that "reading and learning" are also "major life activities," and that lawyers who read less well than other lawyers are "disabled."

The division has argued that broad questions from a state medical board pertaining to a history of psychiatric illness, drug use, or alcohol abuse are discriminatory under the ADA, unless "drawn to focus on current impairments of a physician's fitness to practice medicine." The division has supported challenges to inquiries into past treatment for mental illness performed to certify candidates for admission to the state bar.

Under pressure from the division, a North Carolina town has decided to remove an inaccessible, newly constructed gazebo located at an historic overlook. The City of San Bernadino is now required to provide sign-language interpreters at all its meetings and to procure, within 48 hours of a request, materials in alternative formats such as braille, large type, or audiotape.

The division is also making sure that the disabled can gamble as easily as the rest of us. It has forced Oregon and New Hampshire to require businesses that sell lottery tickets to provide easy access for wheelchair users. Similarly, in *United States v. Dover Downs Entertainment*, the division argued that betting windows at racetracks are covered by the ADA, and that expenditures up to 20 percent more than the total cost of renovations must be made if it will improve accessibility for the disabled.

Restaurants and bars are part of the division's "public accommodations" portfolio. The division has issued a notice of potential violation because a restaurant's customer could enter only through the kitchen, and in another case, because the nondisabled frequently took the parking spaces of the disabled. A New York restaurant agreed to modify its dress code after turning away a customer wearing sneakers due to a mobility impairment. A bar in Illinois agreed to modify its policy of refusing to serve alcohol to customers who appear to be

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drunk based on the way they walk because a customer with Parkinson's disease had been refused service!

Schools are under the division's scrutiny, too. The division successfully forced a preschool to have its employees use a finger-prick test to monitor the blood-level of children with diabetes and to administer injections to children suffering from life-threatening allergic reactions. The preschool had wanted these tasks performed by nurses or paramedics rather than child-care providers, but the division saw this as discrimination against children with diabetes and food allergies. The division has also challenged state regulations in New York that prohibit anyone missing a limb from driving school buses.

Because a driver's license ID is unavailable to those who cannot drive on account of a disability, the division has argued that stores should accept other ID cards for personal checks or other transactions requiring identification. The division has also argued that the ADA covers the terms and conditions of a company's insurance policies. Pursuant to division settlements, realty companies must supply interpreters for the hearing impaired during negotiations; theaters must supply assistive-listening devices; and a pet store must supply an interpreter for the hearing impaired (humans) during its dog-obedience classes.

Who decides?

It is difficult to calculate the costs of a regulatory statute, especially in an environment of excessive litigation and overly aggressive enforcement. The ADA is not a frictionless machine. It requires huge administrative and litigation expenditures, only some of which are actually required by the act. Much of this cost is not compensated for, and can thus be described only as a dead-weight loss.

Suppose, for instance, that an employer is contemplating whether to build an elevator, in addition to an already existing stairway, at its plant. The company consults with its lawyers and decides this would be an undue hardship rather than a reasonable accommodation. The company is sued. It negotiates with the plaintiff-employee and the EEOC, but the talks deadlock, and the case proceeds to court. The company loses but decides to appeal. It wins on appeal, and the plaintiff and

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the EEOC decline to take the case to the Supreme Court.

Well, say the ADA's apologists, no harm, no foul. The company did not think that it was obligated to install an elevator, and the court confirmed that decision. The system works. Indeed, the American Bar Association's Commission on Mental and Physical Disability Law has concluded that since so many ADA complaints are unsuccessful, the ADA is too favorable to employers. But it was very expensive for the company in this example to get the verdict it thought it was entitled to all along. It had to pay its consultants and lawyers at every step of the legal process. Had it lost, it would have had to pay the other side's lawyers as well. And the taxpayers have a heavy bill to foot, whichever side wins, because someone has to pay to maintain the EEOC and the courts.

But the costs of the ADA are not only economic. One of the most controversial applications of the ADA came when a federal magistrate ruled that the Professional Golfers Association (PGA) had to allow a disabled golfer, Casey Martin, to ride in a golf cart during tournaments. The PGA had refused to waive its requirement that tour competitors walk the entire course.

Who decides? Who can best determine the rules of tournament golf—the PGA or the federal government? Similarly, who should decide where it is safest to fill the tooth of an HIV-positive patient? Or, who should decide whether it is safe to have one-eyed firemen, policemen, truck drivers, and pilots? Under the ADA, the answer is always the same: the federal government.

Is the ADA constitutional?

Those unhappy with the ADA have two basic means of attack: Persuade Congress to amend it, or persuade a court that Congress lacked authority to pass it in the first place. It is uncertain whether the ADA is constitutional. The Supreme Court has made it clear in recent years that it is willing to strike down as unconstitutional a federal statute if Congress cannot point to an enumerated power, in the Constitution, that gives it the authority to enact the statute. Congress justifies its authority to regulate private actors by citing the Commerce Clause, while its authority to regulate state and local governments supposedly derives from Section Five of the Four-

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teenth Amendment. (These are the two sources of authority cited by Congress in the "Purpose" section of the ADA.)

But both of these claims of authority are shaky. Racial discrimination had a "substantial effect" on interstate commerce, and the national economy was strengthened by Congressional legislation. But the effect upon interstate commerce of discrimination against the disabled simply does not approach that of racial discrimination, and the burdens the ADA has placed on the national economy are at least as great as its benefits. Likewise, based on precedent, it is probable that the Court would uphold any state discrimination against the disabled so long as it has some "rational basis"; accordingly, a federal statute that not only bans such discrimination but positively requires states to make "reasonable accommodations" for the disabled is pushing the limits of Section Five.

While it is not impossible that part or all of the ADA could be struck down as unconstitutional, this type of challenge is difficult and unpredictable—becoming more so with each additional judicial appointment made by the Clinton administration. That leaves the legislative avenue, which, in this instance, is most fitting anyway.

Bureaucrats and judges have been rightly condemned for distorting the meaning of the Civil Rights Act of 1964. A colorblind ban on discrimination was transformed into a powerful engine for quotas based on race, ethnicity, and sex. There have been many instances in which bureaucrats and judges have also been responsible for the ADA's excesses. But the essential problems with the ADA existed from the start, because Congress put them there. Recently, on the television show "Crossfire," former U.S. Representative and ADA sponsor Tony Coelho said of the law, "It was deliberately written vaguely." Since the deficiencies in the ADA were conceived by Congress, it ought to be up to Congress to fix them.

Most Americans, if asked to list persons they considered disabled, would name the blind, deaf, and those with missing or paralyzed limbs. They would not readily think of people with mental impairments and bad backs. Yet the EEOC receives most of its complaints from precisely these two groups. The ratio of dubious to plausible ADA complaints is bound to increase now that prison inmates are clearly within ADA's

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purview—another problem that Congress probably did not intend but should have foreseen.

Possible reforms

Reforming the ADA will not be easy. The lobby for the disabled is powerful and well organized. No politician wants to be perceived as anti–civil rights, let alone as unsympathetic toward people in wheelchairs. What's more, the disabled live in every congressional district, so no Senator or Representative can afford to ignore them. The disability lobby will oppose any reform, no matter how limited and plausible, on the not unreasonable theory that a door cracked open for even a minor reform may be hard to close.

Certainly, there are those of us who think that, despite its good intentions, the entire ADA is bad policy, quite possibly unconstitutional, and ought to be repealed. But it is not going to be repealed anytime soon. The only realistic hope, in the short term, is to curb some of the ADA's excesses.

There are a variety of approaches to reform the ADA. The narrowest is to target very specific problems that have arisen under the ADA's enforcement, bundle them together, and ask for a vote on these amendments. For instance, the definition of "qualified individual with a disability" in Title II of the act could exclude prison and jail inmates (legislation has already been introduced to accomplish this). This definition (which appears in the ADA's employment title as well) could also exclude policemen and firefighters who are blind in one eye. Pilots with a history of alcoholism or substance abuse could also be exempted. Certain technical questions that have arisen concerning the intersection of the ADA with the Family and Medical Leave Act and the National Labor Relations Act could also be addressed.

Another approach would acknowledge that, in some cases at least, the answer to the "Who decides?" question should not be the federal government. For instance, where issues of safety or public health arise because of an employee's or customer's disability, greater deference to the company could be formally required. This would ease the anomaly of federal bureaucrats and judges making the safety and health decisions that are best made by the policemen, firefighters, doctors, and

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dentists who will have to live (or die) with the consequences. This deference to other decision makers could be required in any situation where the alleged "undue hardship" was not exclusively economic. The PGA's objection to changing its rules is not economic, and it seems very odd that the de facto rulemaker should be the federal government.

With respect to cases of economic "undue hardship," Congress could define precisely how much companies should be expected to spend on "reasonable accommodations." The more mechanical the calculation, the better. Perhaps what is needed is a table matching ascending company size with required expenditure per employee (a Michigan disability-rights statute takes this tack). A less-than-perfect grid is preferable to an inspiring but ambiguous string of words. Another approach might be to cap any expenditure as a percentage of the employee's annual salary.

A more ambitious reform would change the ADA's definition of "disability" to exclude mental impairments. To a much greater extent than physical disabilities, mental disabilities are almost always relevant to the job, frequently raise safety issues, and often involve very difficult line-drawing questions. Substance abuse, especially, should be excluded from ADA coverage.

Rather than including any physical impairments that "substantially limits one or more of the major life activities," Congress should list the impairments that it intends to cover, or at least the impairments that it wishes to exempt, or list what it considers to be "major life activities." The quoted phrase is too vague. Once more, the pursuit of a perfect—but necessarily vague—standard has ruined the potentially beneficial results that might ensue from a more prosaic bill. Rather than have companies guess—and judges and bureaucrats decide—if asymptomatic HIV is a disability, Congress should decide this question itself.

A final reform might actually be supported by the disability lobby. Any expenditure made as a result of the ADA should be reimbursed by the federal government (limited tax credits are already available for some expenditures). ADA advocates frequently deny that the expenditures required by the statute are onerous, contending that society as a whole is better off because of them. Very well then. Society as a whole should pay for these supposedly minor outlays.

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Assessing welfare reform: work pays

JACK A. MEYER

WELFARE reform is off to a good start. Between 1994 and 1998, welfare rolls declined 37 percent. Fewer people are staying on welfare, and fewer are applying for benefits. Several state evaluations of welfare reform show that many welfare recipients have foregone cash payments for paychecks. Studies in Maryland, North Carolina, and Wisconsin find that many former welfare recipients are working three to twelve months after the termination of their cash payments. These findings bode well for the ultimate goal of a sound welfare-reform policy, which should be to help individuals find and retain employment, and, over time, achieve a decent standard of living. Simply put, welfare reform should move people from dependence to self-sufficiency.

Of course, there is ample room for debate over what constitutes a decent job and self-sustaining wage. Further, emerging studies show that while most people leaving welfare are finding jobs, about a third are not. I would suggest that to secure and sustain employment, and to become self-sufficient, people moving from welfare to work need a two- or three-year "plan" that combines initiative, motivation, and hard work on the part of the individual, with a system of adequate transitional supports from the public sector. This support should be maintained long enough, and be rescinded gradually enough, to avert a "revolving door" between work and welfare, or an increase in unemployment, homelessness, and poverty.

Only one year ago, there was scant information about what would happen to millions of welfare recipients when strict time limits, work requirements, and tougher sanctions replaced the more open-ended welfare system that had remained relatively unchanged since its inception six decades before. The welfare program, to be sure, had undergone minor changes during its

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existence, but its basic tenets had remained the same until the 1996 reform. While many people concurred that the welfare system needed to be overhauled, some feared that the imminent changes would be punitive, resulting in tragic consequences for many of the poorest and most vulnerable in our society.

THE massive experiment in welfare-reform policy was made possible by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which replaced Aid to Families with Dependent Children (AFDC) with the Temporary Assistance for Needy Families (TANF) program. TANF strictly limits the number of months a family can receive cash aid. No longer an entitlement, welfare under TANF became a block grant to the states, allowing them to set work requirements and to sanction citizens who were unwilling to meet them.

The welfare reform of 1996 allows former welfare recipients to retain some of their cash assistance—as well as noncash benefits such as health insurance and child-care services—while making the transition into the workforce. It also allows states to penalize entire families for noncompliance with work requirements, possibly putting children of sanctioned parents in financial jeopardy. The reform permits states to exempt from workfare up to 20 percent of their welfare caseload, but the majority of recipients are expected to move swiftly from welfare to work while participating in work-preparedness programs as a condition for receiving cash assistance.

These reforms are occurring during very favorable economic conditions. Unemployment and inflation have been low throughout the mid and late 1990s. Tight labor markets have created enormous opportunity for all levels of workers. In certain sectors, even entry-level workers are being wooed with signing bonuses and benefit packages. Not surprisingly then, several studies show that many welfare recipients are successfully making the transition from welfare to work.

These findings are contrary to the conventional wisdom that private-sector employers are unwilling to "take a chance" on former welfare recipients because they are perceived as lazy or likely to have spotty employment histories. Former welfare recipients may also have limited education and training, and physical or behavioral health problems. Such disadvantages can promote the idea that long-term welfare recipients have a poor work ethic and are essentially unemployable. But this has not deterred employers from hiring substantial numbers of former welfare recipients.

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IN a survey of 500 employers conducted for the Urban Institute, my colleagues and I found that the majority of employers—most of which had 100 or fewer employees—held favorable views of welfare recipients' performance in the workplace. When asked whether former welfare recipients would demonstrate a "willingness to work," "motivation," "reliability," and "ability to be trained," about one-third of employers had a positive view, and another one in five were neutral; only one in five expressed negative views. Furthermore, employers indicated that this population could be a boon to the entry-level job market. Over 60 percent of employers surveyed said that they had already hired someone who had previously been on welfare. And this group of employers was *more* likely to express favorable views about former welfare recipients than employers who said they had no experience with them (or did not know whether they had hired any). Nearly all employers who had hired someone from welfare said they would be willing to hire another welfare recipient.

What traits do employers say they value most in entry-level hires? Our survey asked employers to select three qualities, from a list of twelve, that were the most important to them when considering whether to hire a new worker. The two most desired qualities were a "positive attitude" and "reliability," with two-thirds of the employers including these qualities among their top three choices. About one-third of employers said they valued a "strong work ethic" and "punctuality." Only one in eight listed having prior work experience among their top three qualities. Fewer than one in twenty required that new entry-level hires possess "all of the necessary training."

Our survey reveals that employers are willing, sometimes even eager, to hire qualified welfare recipients, irrespective of government incentives to hire them. Most employers were not even familiar with incentive programs, such as the Federal Work Opportunity Tax Credit, state income tax credits, government-sponsored employee training programs, employee candidate screening, and training in work readiness. Those that were aware of these government programs showed little interest in them. In a telephone survey we conducted with 25 employers, one employer simply stated, "They couldn't pay me enough to hire a bad worker."

Why are employers apparently unaffected by a prospective employee's association with welfare—an association that just a few years ago was perceived to be an impediment to employment in the private sector? Welfare reform is adding millions

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of prospective workers to the entry-level labor market. While some critics view this as a threat to the job stability and wage levels of those already employed in a strong economy with low unemployment, a steady influx of welfare recipients should help employers fill vacancies without displacing existing workers. This influx of new workers at the "low-end" of the labor market could help fill unmet needs in the service and retail sectors.

A 1998 survey of 900 Michigan employers, conducted by Michigan State economics professor Harry Holzer, also describes an employment climate that is open to welfare recipients. Holzer's data show that employers are willing to fill 3 percent of their staffs, right now, with welfare recipients, and up to 9 percent over the course of the coming year. Given the entire welfare population of Michigan, this represents, according to Holzer, a significant amount of potential job availability. Holzer's study reveals a substantial need for labor, with vacancy rates (5 percent or 6 percent) higher than unemployment rates. According to Holzer, "If accurate, this reflects an extraordinary (and perhaps unprecedented) degree of labor market tightness." As with our survey, Holzer's work demonstrates that most former welfare recipients will likely find jobs in the retail trade sector, largely because this tends to be where most of the unskilled jobs are located. But, while Holzer's analysis reveals that prospective employment is strongly correlated with unmet labor demand, his research finds substantial skill deficiencies in the welfare population, leaving them highly vulnerable to an economic downturn. Indeed, Holzer believes that a recession could trigger a precipitous decline in demand for welfare recipients in the labor market.

SINCE even the minimum wage yields a higher income than most cash-assistance benefits, former welfare recipients who find full-time employment should be better off, financially, than those who remain on the public dole. A recent study by Gregory Acs and his colleagues at the Urban Institute bears this out. The study delineates how the income of a single mother with two children changes as she moves from unemployment to working at a part-time job at the minimum wage, then to full-time work at the minimum wage, and finally to a full-time job paying $9 per hour. In calculating income, the researchers considered the household's earnings, its TANF (welfare) grant, the cash value of the food stamps it receives, federal and state earned-income tax credits, other state tax

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credits, and all federal and state tax liabilities.

According to the Acs study, a family that moves from no work to part-time work at the federal minimum wage will see its total income grow dramatically. Specifically, the family income would increase by 51 percent, on average, if the single parent began working 20 hours a week at a job paying $5.15 per hour. As the same family moves from part-time work to full-time work at the minimum wage, its total income grows by another 20 percent. And, as it moves to full-time work at $9 per hour, total family income increases by another 16 percent.

A large portion of the increase in wages from welfare to full-time minimum-wage work is due to the Earned Income Tax Credit, an often ignored source of income for low-wage workers. In some states, this source of income accounts for more than half of the increase in family income when a welfare recipient moves from unemployment and cash assistance to part-time work at a minimum-wage job. The Earned Income Tax Credit can add $3,000 a year or more to the family income of a low-wage worker.

However, while many employers are willing to hire welfare recipients, and while steady full-time jobs improve their finances significantly, a thorough assessment of welfare reform must also consider how much work time welfare recipients can expect during the year and the nonwage benefits that welfare recipients will likely secure after leaving cash assistance. Here, our survey provides some sobering information.

IN our survey, employers reported that they paid $5.50 per hour for a typical entry-level position. Almost half of the employers said they provided some form of paid vacation; only 17 percent offered paid sick leave; very few provided transportation subsidies; and almost none provided child-care assistance. Nearly half of the employers provided health benefits, but only 6 percent said that employees were entitled to the benefits immediately. Often, employers instituted lengthy waiting periods before providing health benefits. Twenty-nine percent of the employers we surveyed required at least a year's wait before providing health insurance to workers. Because of these waiting periods and the high turnover of minimum-wage jobs, many low-end employees never become eligible for health insurance or other company benefits.

Employers indicate that part-time workers make up a large share of their entry-level workforce. Nearly half of the entry-level workers employed by the respondents of the survey worked

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on a part-time basis. Thus, even when employers offered health insurance and other benefits, entry-level workers were often ineligible because of their part-time status. In addition, if people can only work 20 hours a week at the minimum wage, their earnings, even when supplemented by tax credits, may not exceed cash assistance. As a result, they are left mired in poverty, unable to meet basic living expenses.

WELFARE reform has proceeded with relatively few glitches largely because of our booming economy and the powerful demand for workers. Individuals who have successfully made the transition from cash assistance to a private-sector job—and who have found health insurance through Medicaid, an employer-sponsored plan, or some combination of the two—will undoubtedly be better off, in the long run, than if they had remained on welfare. Moreover, their years of experience at an entry-level job may enable them to move into higher-paying jobs, many of which will come with more or better benefits. Some of the former welfare recipients may move into semi-skilled or skilled jobs over time, making them less vulnerable to swings in the labor market. But the economic climate during which these reforms are occurring is so favorable that it is difficult to predict how secure even these individuals would be if there were a downturn in the economy.

A strong economy has enabled us to avoid developing a sound long-term policy for welfare reform. The economy has created a climate in which the majority of individuals who seek some sort of employment can find at least part-time, low-wage work. As long as the economy continues to boom, welfare recipients will have a tremendous opportunity to move into private-sector employment. But few safeguards are in place to prepare these individuals for what might occur if the labor market loosens up. The public sector, then, must provide some basic safeguards in order to protect workers from the volatility of the labor market and to ensure that it remains more worthwhile for people to work than to stay on welfare. Three public services are essential to this task: child care, health insurance, and transportation.

Paid, center-based child care costs at least $4,000 to $5,000 per year for each child. For people leaving welfare, selecting this option over child care by a family member or church-based organization would be difficult since the cost of child care can be prohibitive. Transitional financial assistance for child care, then, is absolutely essential. But many people leav-

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ing welfare for work are unaware that such government aid is available. According to a study by Shoptrine and Associates, a research organization that specializes in analyzing access barriers to government social programs, 52 percent of those leaving welfare in North Carolina were unaware that parents giving up welfare to go to work could get financial aid for child-care expenses for up to one year. Eighty-two percent of welfare recipients did not know that the Earned Income Tax Credit offsets most of the foregone cash assistance upon leaving welfare for work. A study we conducted in Indiana found widespread complaints among welfare recipients that government child-care payments were often late or inadequate in covering the costs of care. It is clear that there is much work to do in this area.

Many people leaving welfare for work will take jobs without employer-sponsored health insurance. While Medicaid is available during the transitional period, many former welfare recipients are unaware of it. The "grandfather" clause in the 1996 welfare-reform legislation protects the health insurance of parents leaving welfare as long as their income remains very low—a single promotion could make them ineligible for coverage, even if the new State Children's Health Insurance Program (SCHIP) provides coverage for their children. Family medical coverage may cost parents $5,000 per year or more, depending on whether any family members have ongoing health problems. States must be creative in their use of SCHIP and Medicaid, as well as insurance pools and purchasing cooperatives for employees of smaller firms, in order to ensure affordable health coverage for lower-income workers.

Transportation is also a formidable obstacle for people leaving welfare for work. Of the employers we surveyed, 39 percent said that their entry-level jobs were not accessible by public transportation. Many welfare recipients do not own a car. State and local officials should work on this problem by extending public transportation to more suburban or exurban areas, and by encouraging the use of van pools and ride-sharing arrangements.

PEOPLE leaving welfare in search of employment have reasonably good prospects of finding jobs. So long as they are reliable and demonstrate a positive attitude toward work, there is a good chance that employers will offer them an entry-level job, even if they have limited education and training. Many entry-level jobs that they will be offered will be part-time with

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low wages and skimpy, or non-existent, benefits. A smooth and permanent transition from welfare to independence and self-sufficiency will require government assistance in providing child care, health insurance, and transportation for one year, possibly longer. The early results of welfare reform have been positive, but this progress, in order to be sustained and secured, especially in less hospitable economic times, must be supplemented by public benefits that will enable former welfare recipients to complete the precarious transitional period without lapsing back into welfare dependency.

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The moralist of the dismal science

FRANCIS FUKUYAMA

ADAM Smith has long suffered from having become an icon of laissez-faire capitalism, revered by the Right and despised by the Left. As little as a generation ago, it was hard to find intellectuals in the West who took him seriously. His books were seldom read in college surveys of Western thought, and he was not regarded as even remotely in the same league as the now-fallen Marx and Freud. At the other end of the ideological spectrum, participants at libertarian conferences gave out Adam Smith neckties, but probably spent as little time reading Adam Smith seriously as those on the left.

This failure to take Smith seriously is strange in view of the respect bestowed upon him by his contemporaries: Hume, Burke, Gibbon, and Kant all greatly admired him; Hegel and Marx incorporated his views on political economy into their own theories of history. With the collapse of socialism and the turn to free markets by many countries around the world in recent years, it is perhaps not surprising that Smith has seen something of a renaissance, with numerous studies published that help to restore him to his rightful place in the Western tradition. At the top of this list is Charles Griswold's excellent new book, *Adam Smith and the Virtues of Enlightenment*.†

A reexamination of Smith is particularly necessary in light of the scrutiny Enlightenment liberalism has received in recent years. The fundamental premise of the Enlightenment's political project was that, in the interests of political order, shared values concerning final ends or the good life had to be taken off the table and relegated to the realm of private belief. Political community could no longer be defined in religious terms; in its place would be a neutral framework of laws and institutions that would guarantee rational individuals the right

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to pursue whatever ends they chose under a social contract.

The problem of the liberal Enlightenment, as articulated by writers such as Peter Berger, Alasdair MacIntyre, Ralf Dahrendorf, Michael Sandel, Mary Ann Glendon, and others, can be stated as follows. The success of the liberal project always depended on the persistence of certain shared cultural norms that were not themselves the product of liberal institutions; many, indeed, came from religious traditions that liberalism sought to exclude from the public sphere. The evolution of liberalism over time has tended to undermine those norms in the name of liberal individualism. Toleration of diversity evolves into today's celebration of diversity; political pluralism degenerates into cultural relativism; Glendon's "lone rights bearer" continually increases his sphere of personal autonomy without accepting any additional duties to the community. Social cohesion is shattered and in its place is a babble of self-regarding groups seeking public recognition of their "cultural rights." Linking contemporary problems like family breakdown, promiscuity, and rising crime to the loss of traditional values and the rise of "secular humanism," many conservatives argue that the Enlightenment's liberal wing is in the process of undermining itself just as its socialist wing did in 1989.

GRISWOLD performs a valuable service by showing us that one of the Enlightenment's most important founding thinkers believed that liberal commercial societies were dependent on, productive of, and ultimately legitimated not by wealth or freedom but by virtue. Contrary to what his libertarian supporters may claim, Smith never sought to justify a capitalist economic order primarily on the basis of its superior economic efficiency (though that was, in fact, an important advantage) or on some abstract belief in the primacy of individual freedom. Such a defense of capitalism would lead to what became known as the "Adam Smith problem"—that is, a supposed contradiction between the acquisitive individuals "bettering their condition" in the *Wealth of Nations* and the moral actors in the *Theory of Moral Sentiments*. But the focus on political economy in the *Wealth of Nations* is part of what Smith calls "Natural Jurisprudence," which, in turn, is strictly subordinate to the broader study of moral philosophy.

For Smith, the primary advantages of a liberal commercial society lie in its consequences for moral action. On the one hand, it avoids the vices of the aristocratic, theocratic, or mercantilist orders to which it was an alternative—vices like

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religious fanaticism, slavishness, or the excessive dependence of the poor on their social superiors. On the other hand, by making each individual the owner of his labor, commercial society tends to promote certain virtues like prudence, diligence, thrift, and honesty.

Smith is, however, no straightforward partisan of liberalism. He says that the prototypical bourgeois virtue of prudence earns only our "cold esteem"; his analysis, in the *Wealth of Nations*, of the deadening effects of the division of labor on the worker in the pin factory served as the basis for Marx's concept of alienation. For Smith, liberal commercial society is clearly second best, to be preferred only because the best regime is incapable of realization. A society in which virtue is placed front and center—a theocracy, for example—produces unexpected and counterproductive consequences, including hypocrisy and moral lassitude in the orthodox, and fanaticism and opposition in the heterodox. Smith preferred a "free market of religions," in which the need to attract followers promotes active belief, and the diversity of sects keeps fanaticism in check—something not unlike the actual condition of sectarian Protestantism in the United States. If religious belief, nonetheless, tends to erode over time, there are other sources of moral behavior.

SMITH'S broader political views rest on the moral psychology elaborated in his *Theory of Moral Sentiments*. Contrary to the assumptions of contemporary neoclassical economics, Smith does not believe that human beings are born into the world as bundles of selfish preferences, nor does he argue, like contemporary game theorists, that their sociability arises out of a rational contractarian process. The capability for moral action is natural to human beings. The primary human moral sentiment is sympathy, meaning the ability to feel, by an act of imagination, the joys, pains, fears, and expectations of others. Griswold walks us through Smith's highly complex account of sympathy, showing how it cannot be reduced to just another type of selfish preference, as well as how its misuse can potentially constitute the basis for contemporary identity politics and multiculturalism.

As Griswold explains, Smith does not have a systematic theory of morality, and, in fact, devotes considerable effort to criticizing philosophical systematizers who seek to find first principles for moral behavior. Contrary to Kant, and present-day Kantians like John Rawls, Smith does not believe that

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moral decisions can be made behind a "veil of ignorance" concerning the moral agent's empirical situation. Smith's theory, as well as the rhetorical organization of the book, is much more Socratic. It begins *in media res*, that is, in the middle of a conversation about ethical behavior based on concrete examples. According to Smith, moral action consists in moving from the self-interested perspective of the actors in a moral drama to that of the "impartial spectator." Ethical decisions are based primarily on sentiments of approbation or blame, not abstract reason; but ethics doesn't degenerate into emotivism or narcissism because the viewpoint of the impartial spectator is a shared one that is potentially open to all through reflection and education. While the impartial spectator uses reason, it is emphatically not philosophic reason, but instead, reason that is accessible to all.

In his account of impartial spectatorship, Smith suggests that moral behavior can be grounded in reason and natural sentiment, rather than religion. Like many other Enlightenment figures, Smith was keenly aware of the potential dangers of religious fanaticism; unlike many, he believed religion could be tamed and made supportive of moral ends by disestablishing it. Religious conservatives who attribute contemporary social problems to the rise of "secular humanism" do not, in my view, take seriously enough the nonreligious, natural sources of order, and the ways in which market societies tend to promote certain kinds of moral behavior. And they underestimate, as Smith did not, the difficulty of arriving at anything like a religious consensus under contemporary conditions.

WHILE Griswold interprets Adam Smith by the "principle of charity" (that is, seeking to understand Smith as Smith understood himself), he nonetheless points to some limits in Smith's thought. The most important one has to do with Smith's denial of the possibility of a more philosophical account of the whole. Like Socrates, Smith begins his discussion of moral sentiments from the perspective of ordinary people. Unlike Socrates, he does not believe that there is a way of going past the perspective of the impartial spectator. In other words, there can be no ascent from the cave to genuine moral truth. This leads to certain difficulties. How do we know, for example, that the viewpoint of the impartial spectator does not reflect the contingencies of class, race, gender, or history? Smith could have grounded the impartial spectator's perspective in a natural "moral sense," but he did not, arguing instead

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that moral values are partly created by the spectator. Griswold notes that Smith tried to write a treatise that would have defined "natural rules of justice" applicable to all nations. But he failed and ordered his executors to burn these papers after his death.

Smith's failure remains, in a critical way, our failure, and suggests why the liberal Enlightenment, for all of its material success since the publication of the *Wealth of Nations*, continues to make us uneasy.

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Taking too many liberties?

STANLEY C. BRUBAKER

RICHARD A. Epstein is one of the country's most important libertarian theorists. The University of Chicago law professor first gained prominence in 1985 with *Takings*, which urged that the eminent-domain clause of the Constitution be transported from the technical periphery of constitutional law to its vital center. (The leading textbook at the time devoted only 8 of its 1,650 pages to the subject.) In the spare, concluding words of the Fifth Amendment—"nor shall private property be taken for public use without just compensation"—Epstein purported to find a comprehensive statement of the proper relation between the individual and the state. By his analysis, any diminution of the value of private property by taxes or regulation became a "taking." A taking could be justified, without compensation, if it prevented harm to others. Or it could be justified if it were for "public use" (which Epstein understood according to the stringent criteria of "market failure"), and then only with just compensation. The implications were breathtaking: Major components of the Great Society, the New Deal, Progressive regulation, and any form of governmental redistribution would become unconstitutional. The courts and the academy were not convinced, of course, but the former have seen a modest revival of the takings clause, and the latter now treat the clause with respect. (The current leading casebook devotes nearly 50 of its 1,750 pages to takings.)

Since then Epstein has pressed his libertarian philosophy across several fronts. In major works on law and public policy, he has argued for repealing employment-discrimination laws, limiting the conditions that government may attach to its contracts and grants, providing health care through the market rather than as a governmental entitlement, and reducing virtually all legal relations to six simple principles. As with *Takings*,

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the number of converts produced by these treatises may be modest, but Epstein's readers are consistently rewarded by his clarity, rigor, breadth of learning, and the chance to see the apparently unthinkable—such as the repeal of welfare and discrimination laws or the creation of free markets in babies—in a new and more positive light.

IN his latest book, *Principles for a Free Society*†—based on previously published essays and law-review articles—Epstein seeks to "reinvigorate the classical view of laissez faire." He does so by grounding it not on first principles of natural law but on utilitarianism. Laissez faire's commitments to limited government and the free market derive not from a narrow-minded adoration of individualism but from a concern with the common good of the polity. Natural laws (or natural rights, divine law, etc.—he does not distinguish) appear to Epstein as undemonstrable matters of faith or reasoning which, "to put the matter charitably," he says, "border upon the obscure or occult." Yet the principles of natural law—by which he means the principles of laissez faire—are better, he insists, than the arguments offered to support them. In fact, without the aid of modern economic theory, he argues, natural-law thinkers "developed an acute and sound appreciation of the basic rights that any utilitarian would, on reflection, want to adopt in his society." And it is this utilitarian vision that informs Epstein's conception of the common good—not a good disembodied from the concrete interests of the individuals in the society but a "summation of interests of those individuals." To this he adds the Pareto principle that changes from a baseline condition should be justified by making at least some better off and none worse off.

One of the ways in which a system of limited government facilitates the common good is simply to allow breathing space in which "spontaneous ordering" can occur—such as in the formation of social norms. Informal rules with informal sanctions contribute to the common good either because of the constraints of the market (nasty employers lose good employees) or because of reciprocity (anyone who applied the rule at one time could have it applied against him the next). Unlike law, social norms vary with the particular group and its circumstances, the cost of their enforcement is inexpensive, and their voluntary character preserves individual dignity. Also,

† Perseus Books. 360 pp. $30.00.

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laissez faire, while barring state imposed redistribution, can support a social norm of charity toward the poor. Because it is voluntary, it can make finer and more accurate distinctions than can the state between the deserving and undeserving poor. Of course, there will be neighbors who won't cut their grass, landlords who won't make repairs, and charitable providers who won't help innocents in need. But to address these hardships through extensive legal codes, coerced redistribution, and costly litigation will make only a few better off and most worst off.

A system of laissez faire defended in the name of the common good, by Epstein's analysis, requires more than voluntary transactions among autonomous holders of private property and more than protection against force or fraud. Also necessary—and consistent with the principles of a free society—are a number of forced exchanges. Because of problems of coordination or holdouts, common in any complex society, certain goods are unobtainable through voluntary exchanges. Such goods would include the establishment of government itself, national defense, highways, the maintenance of common property in air and water, and systems of common carriers and public utilities. Obtained necessarily through forced exchange (taxation), these goods are nonetheless justified on the grounds that they approximate the allocations that would have been reached were they obtainable through market exchanges. In all of this, true to his utilitarian commitment, Epstein demonstrates a flexible, empirical approach to the claims of private property. Thus for some societies (e.g., hunter-gatherers), common ownership of land is most advantageous. For more developed societies, common ownership is appropriate only for the air, seas, and rivers. And the private use that can be made of common property—such as the extent to which river waters can be used for irrigation by riparian owners, or sold by them to others, or diverted for mill owners—depends on marginal costs and benefits in the particular climate, geography, and society.

SO does Epstein succeed in his goal of reinvigorating laissez faire? Yes and no. By defending and qualifying it in service to the common good, he rescues laissez faire from the caricature often drawn by its critics. Yet the good, as he defines it, hardly seems good enough. To escape the problems of subjectivity that he sees in assertions of natural-law claims, he disdains to impose any "value judgment" on the individual preferences of people. So, into his basic utilitarian calculus, from

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which all of his principles of liberty are supposed to originate, we must add the preferences of the murderer, rapist, and thief, as "every act of murder, rape, or theft produces some benefit for someone"; "no preferences or desires can be blithely dismissed as illegitimate just because it makes the final tally easy." Perhaps this philosophy would yield the principles of liberty and the prohibitions on force and fraud he desires, but such tenets hardly inspire confidence.

Laissez faire provides a useful approach to economic questions and therein lies its strength. In applying it to political and social life, however, Epstein casts doubt on its plausibility. By casting all "preferences" as equal in stature, none right or better by nature, Epstein creates a polity able to provide incentives and disincentives, but not to punish or honor; punishment becomes a mere tax on a course of conduct, honor a subsidy. Liberty too is undifferentiated. Freedom of speech and religion stand on the same plane and are defended equally with polygamy and same-sex marriage, each permissible as it causes no harm to others. Epstein is quite concerned to show that laissez faire can account, through its allowance of forced exchanges, for national defense. In actuality, he shows only why we can be made to pay for an army. Why anyone would serve in it, he does not say. Laissez faire can give us a sound economy, but not a country to die for.

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What's economics good for?

IRA CARNAHAN

ONE of life's little puzzles is the price of popcorn in movie theaters. It costs almost as much to buy a bucket of popcorn as it does to see the movie itself. Movies cost tens of millions of dollars to produce. Popcorn costs almost nothing to produce. Why, then, is popcorn so expensive?

Most people think that it's so expensive because the movie theater has a monopoly over concessions. Since you can't buy popcorn anywhere else, the theater owner has you over a barrel. But this view assumes that moviegoers decide to see movies without considering how much it's going to cost to buy popcorn or a soda. Are moviegoers so shortsighted as to carefully consider the price of admittance to a theater but not the price of concessions?

No, say economists who have studied this issue. Moviegoers are well aware that popcorn is overpriced. But the price remains high because theater owners have learned that exorbitant prices enable them to reap big profits from moviegoers who care little about cost, while still collecting ticket fees from those who are concerned about the cost.

This practice of tailoring prices for different types of people—which economists call "price discrimination"—is common. Airlines, for example, offer a lower fare to those passengers who stay over a Saturday night. Is that because their staying over saves the airline money? Not at all. The Saturday requirement is merely a convenient way for the airline to separate leisure travelers, who tend to be price sensitive, from business travelers, who tend to fly whatever the price.

Price discrimination explains other business practices, too. Consider the ubiquitous coupon. In 1996, makers of consumer goods handed out 270 billion coupons. Why? An obvious explanation is that coupons get consumers to try products for the

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first time or to buy more of them. Discounted goods are enticing. But if the goal is to lure people with a lower price, why not just mark down the price at the store? It is a lot simpler to run an ad announcing a sale than to require consumers to clip coupons and remember to bring them in when they shop. Coupons also create extra work for cashiers and store managers, who must process all those little pieces of paper and forward them to the manufacturer.

So why bother with coupons? Because, economists say, they let stores price discriminate. "The supermarket's ideal pricing policy is, 'lower prices to those who would otherwise shop elsewhere,'" writes University of Rochester economist Steven Landsburg. "A practical approximation to this ideal is, 'lower prices to those with enough free time to clip coupons.'" Landsburg observes that coupons would make no sense if everyone used them. Likewise, why hand out coupons if the users are completely random? Coupons work by offering discounts to "precisely those customers who are most sensitive to price."

THE point of this discussion of price discrimination is not to turn you into an expert on the subject. The point, rather, is to illustrate what economics is good for. This may be necessary, because many people don't think it's good for very much—among them is Melvin Reder, author of *Economics: The Culture of a Controversial Science*† and professor emeritus of business at the University of Chicago. According to him, there is a wide gulf between what economists think they do and what they actually do.

Most economists see themselves as scientists who doggedly—and generally successfully—pursue the traditional scientific goals of prediction and control. But Reder says, "Thus far their success in doing so has been quite limited." As the *Economist* once put it, an economist "is an expert who will know tomorrow why the things he predicted yesterday did not happen today."

Reder lists several reasons why predicting economic outcomes is difficult. One is that the very act of predicting can influence the activity being predicted. Predictions of economic growth, for example, influence the investment decisions of firms, which, in turn, affect the rate of economic growth. While such feedback effects don't make prediction impossible, they do make it hard.

† University of Chicago Press. 384 pp. $35.00.

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Another problem Reder identifies is that "in economics, far more than in the natural sciences, testing a suspect hypothesis is difficult, and usually the results are indecisive." Why are the results indecisive? Because economists, unlike natural scientists, cannot conduct controlled experiments.

Let's say an economist wants to know how much college attendance increases a person's income. It might seem that all the economist needs to do is compare the earnings of people who have gone to college with those of people who have not. But that formula is not accurate because people who have attended college are usually smarter and more motivated than people who haven't. To reach an accurate conclusion, the economist needs to compare the income of a group of people who have attended college to the income of an identical control group that has not. In the real world, unfortunately, such identical groups are hard to find. Thus economists are forced to rely on statistical measures that attempt to account for group differences. Such corrective measures are sensible, but far from perfect.

REDER indicates another reason why economists have a tough time making predictions. Like the natural sciences,

> economics conceives of behavior at higher levels of complexity ... as resulting from the behavior of simpler entities, ultimately individuals. However, economics does not contain, or propose, an explanation of individual behavior in terms of constituent parts of individuals.

It offers general assumptions about how individuals behave, but doesn't go any deeper. In contrast, physicists and chemists explain observed behavior in terms of interacting atomic particles. The behavior of atomic particles, in turn, is "explained by the behavior of subatomic particles and so on through ... the 'ultimate units of explanation.'"

Economists do not have measuring instruments of such precision. They rely on the basic—and contentious—assumption that individuals are rational. As economist David Friedman has explained, economists assume "that people have reasonably simple objectives and choose the correct means to achieve them. Both assumptions are false—but useful."

One reason economists assume the rationality of individuals, says Friedman, is that this assumption works better than any other assumption. Another reason is that, in many cases, "what matters is not the behavior of a single individual but the

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summed behavior of many. If irrational behavior is random, its effects may average out." A third reason for assuming rationality is that, in economic settings, there is often a sort of natural selection that favors rational behavior. Friedman offers the example of investors in the stock market.

> Investors who consistently bet wrong soon have little left to bet with. Investors who consistently bet right have an increasing amount of their own money to risk—and often other people's money as well. So well-informed investors have an influence on the market out of proportion to their numbers.

REDER does not necessarily disagree with these arguments for assuming rationality. Where he parts company with many economists is over the question of how much economics has achieved as a scientific pursuit. In Reder's view, "there is virtually no part of economics where the implications of an overall theory have been convincingly borne out by empirical observation." "Unfortunately," he writes, "few, if any, economic relationships exist whose temporal stability would not be subject to serious doubt if proposed as an instrument either of prediction or control."

Matters aren't so grim. Economists can confidently predict many economic relations: If the price of ice cream doubles, ice cream sales will fall. And, if the supply of money doubles, prices will rise. What economists usually can't predict is the exact rate at which prices will rise, or the precise amount ice cream sales will fall.

That's too bad. But it certainly doesn't mean economists have little to say about prediction and control. They have lots to say. It's just that the most interesting things they have to say involve micro-economic behaviors, rather than macro-economic processes. The former are of interest to business schools, the latter to departments of economics. Guess which has greater academic prestige?

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